UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of:

MIKE-SELL'S POTATO CHIP CO.

and Case No. 09-CA-184215

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS, SALES AND SERVICE, AND CASINO EMPLOYEES, TEAMSTERS LOCAL UNION NO. 957

BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ANDREW S. GOLLIN

Respectfully submitted,

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I. INTRODUCTION[1]

Respondent Mike-sell's Potato Chip Co. ("Mike-sell's" or "Company") has filed Exceptions to the Decision and Recommended Order ("Decision") of Administrative Law Judge Andrew S. Gollin ("ALJ") issued in this case on July 25, 2017. *See* JD–55–17. Stated briefly, Mike-sell's excepts to certain factual findings, evidentiary rulings, and legal conclusions of the ALJ, including but not limited to his ultimate holdings that the Company violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("Act") by (1) refusing to bargain over the decision to sell sales territory to independent distributors; and (2) refusing to provide information sought by the Union for such decisional bargaining. (ALJ, pp. 2, 14-28.) Because Mike-sell's denies all liability, the Company also excepts generally to the remedy and recommended order in the Decision. (ALJ, pp. 27-30.) Should the Decision be upheld on the issue of liability, however, Mike-sell's further excepts to specific parts of the remedy, recommended order, and notice to employees.

II. STATEMENT OF FACTS

A. Introduction

This proceeding came before the ALJ on May 31, 2017, through June 2, 2017, in Cincinnati, Ohio. The case concerns an Amended Complaint and Notice of Hearing ("Complaint") issued by the National Labor

[1]Joint Exhibits, General Counsel Exhibits, Charging Party Exhibits, and Respondent Exhibits are parenthetically cited as "JX-___," "GC-___," "CP-___," and "RX-___," respectively. The transcript is parenthetically cited as "Tr. ___," and the Decision is parenthetically cited as "ALJ, p. ___."

Relations Board ("Board"), based on a second amended unfair labor practice charge ("Second Amended Charge No. 09-CA-184215") filed by the International Brotherhood of Teamsters, Local Union No. 957 ("Union"), alleging Mike-Sell's violated Sections 8(a)(1) and 8(a)(5) of the Act by (1) refusing to bargain over its decision to sell sales territory to independent distributors; (2) refusing to provide information sought by the Union for such decisional bargaining; and (3) selling Company vehicles to or entering contracts with independent distributors. (ALJ, pp. 1-2.)

Contrary to the ALJ's Decision, the Company's decision to sell routes in order to effect a change in its business model did not amount to subcontracting and is not a mandatory subject of bargaining. Rather, the Company's ongoing shift in the scope and direction of its enterprise is consistent with past practice, the Expired Contract, the Revised Final Offer, the Paolucci Award, and controlling law.[2] (JX-1; RX-2; RX-3.) The ALJ found no evidence of improper motive to discredit the Company's judgment about which business models to follow or which business units to retain.[3] Because the Union cannot force Mike-sell's to bargain or produce information regarding non-mandatory subjects—such as the decision to sell its sales territory—the Company was not required to respond to the Union's August 31st information request, which was made for the stated purpose of such decisional bargaining. In any event, the Union's information requests were not relevant and necessary for the Union to perform its statutory duties. For these reasons, which will be further detailed herein, Mike-sell's respectfully submits that the ALJ's Decision should be reversed and that the Complaint should be dismissed.

B. Historical Evolution of the Company's Business Model

Mike-sell's is a manufacturer of snack foods in Dayton, Ohio. (ALJ, p. 3-4; Tr. 232.) For over 100 years, Mike-sell's has manufactured and packaged snack products at its Dayton plant and then distributed them to retailers in Ohio, Indiana, Kentucky, Illinois, Michigan, and Pennsylvania through the help of route

[2] Assuming the sale of routes was a mandatory subject of bargaining (which it is not), contrary to the ALJ's Decision, the Union clearly and unmistakably waived its right to bargain over the four routes sold in 2016.

[3] Mike-sell's has never sold routes for the purpose of discriminating against the Union or eroding its support. This is perhaps best evidenced by the fact that the Union voluntarily withdrew its 8(a)(3) allegation as confirmed via letter from the Regional Director dated March 13, 2017. (*Compare* GC-1(a) (including 8(a)(3) allegation) *and* GC-1(c) (including 8(a)(3) allegation) *with* GC-2 (excluding 8(a)(3) allegation).) In fact, Mike-sell's strategically planned all route eliminations in 2016 to coincide with driver resignations or retirements so as to avoid the need for layoffs. (Tr. 113, 182, 248-49, 377, 408.)

sales drivers ("drivers") and independent distributors ("distributors"). (ALJ, pp. 4-5; Tr. 233-34.) Drivers are employed as part of the Company's route sales division. (ALJ, p. 4; Tr. 232, 234.) They are employees paid a weekly commission or minimum salary (whichever is greater) for loading trucks, traveling to customer locations, stocking shelves, taking retail inventories and replenishing product, performing point-of-sale marketing, and rotating and removing unsold or expired product.[4] (ALJ, p. 5; Tr. 70-71, 186-88, 235, 946-49.) In contrast, distributors are independently-owned businesses that take on the entire risk of loss by choosing the type and amount of product to market, buying that product outright from Mike-sell's, preparing merchandise displays, and delivering and re-selling the product to customers in order to recoup their own costs and (hopefully) make a profit. (Tr. 245, 562-64, 583-84, 590-607, 958, 962, 964-66, 969-71, 980, 988.) For sales territories or "routes" serviced by distributors, the Company essentially sells the right to market its product within a specified geographic area,[5] and the distributors purchase Company product up-front and are thereafter the owners of that inventory and all the liability that comes with it. (Tr. 556-57, 595-96, 600-02, 613-14, 989.) Overall, distributors have historically been responsible for servicing far more sales territory—and distributing far more Company product—than drivers. (ALJ, p. 6; Tr. 246-47, 372; RX-2, p. 5.)

Company drivers are represented by the Union. (ALJ, pp. 3, 5.) Their employment was formerly governed by a labor agreement effective November 17, 2008, to November 17, 2012 ("Expired Contract"). (ALJ, p. 3. Tr. 136, JX-1.) From November 18, 2012, through June 12, 2013, drivers worked under the Company's unilaterally-implemented last, best, and final offer ("Final Offer").[6] (ALJ, p. 8; Tr. 315-16.) Since June 13, 2013, however, drivers have worked under the Company's revised last, best, and final offer

[4] The ALJ omits reference to the drivers' guaranteed weekly minimum pay, an important "safety net" that distinguishes them from distributors (who occasionally make no money at all). (ALJ, pp. 5, 18; Tr. 132, 543-44, 556-57, 596, 604-05, 669-70, 951, 970-72, 1000; JX-1, p. 7; RX-3, p. 3.)

[5] For the sake of brevity and to avoid confusion, Mike-sell's will hereinafter refer to its individual sales territories as "routes" throughout this proceeding. However, unlike Mike-sell's drivers, distributors are not actually required to follow any particular route or schedule, or to service any particular customer, within their individual sales territory. (Tr. 586-87, 625-26, 967, 996, 998.)

[6] The Company's Final Offer has no relevance to this dispute. The Board ultimately found the Company's unilateral implementation of its Final Offer to be unlawful. The Board's Order was later enforced by the U.S. Court of Appeals for the District of Columbia Circuit, although the Circuit Court recognized that the situation presented "a close case." *Mike-Sell's Potato Chip Co. v. NLRB,* 807 F.3d 318, 319 (D.C. Cir. 2015).

("Revised Final Offer"), which Mike-sell's contends was lawfully implemented after the parties reached a good faith impasse in June 2013.[7] (Tr. 273, 316; RX-3.)

Mike-sell's has been in business for over a century, but since about 2006, significant losses have forced the Company to rethink its business plan.[8] (Tr. 234-35, 238.) One of the Company's key strategic objectives is to focus more on manufacturing and branding quality products, which is its biggest strength and most promising area for growth and profitability. (ALJ, p. 6; Tr. 244, 246.) In contrast, Mike-sell's is not interested in growing its Company route sales division, which has lost money hand-over-fist for more than a decade because of the high cost of overhead and high risk of loss.[9] (ALJ, p. 6; Tr. 237; 244.) The Company has gradually reduced its Company route sales division by selling certain routes to distributors who buy the product up-front, directly from Mike-sell's—thereby accepting the entire risk of loss.[10] (ALJ, p. 6; Tr. 245.) These distributors then have the exclusive right (as among other distributors) to re-sell Mike-sell's products as they see fit to retail and wholesale customers within their designated area.[11] (Tr. 245.) Some early examples of this business plan evolution—none of which were challenged—are as follows:[12]

- In early 2009, one route was sold to Snyder's of Berlin. The displaced driver had the chance to bump into another route, but she chose to resign. The Union was notified of the decision, but neither requested to bargain nor filed a grievance or unfair labor practice charge. (RX-2, p. 7.)

[7] Consistent with Sections 10616 and 10646.1 of the Board's Casehandling Manual for Compliance Proceedings ("Manual"), the Regional Director has already recognized a "legitimate dispute" over the validity of the Revised Final Offer through the issuance of a Compliance Specification in Board Case No. 09-CA-094143, which expressly admits that "a controversy presently exists over whether the parties reached a good faith impasse about June 13, 2013." The lawfulness of the unilaterally-implemented Revised Final Offer has yet to be determined. (ALJ, pp. 8-9 at fn.11.)

[8] The main reason for these losses is the competitive imbalance between Mike-sell's and its primary competitors, Frito-Lay and retailer private-label products. (ALJ, p. 6; Tr. 235.) Unlike Frito-Lay and private-label brands, Mike-sell's cannot afford to intentionally discount its product so deeply as to take a temporary loss in order to steal away coveted shelf space and sales volume from smaller companies. (ALJ, p. 6; Tr. 236.) The Company's financial condition and competitive struggle are not unique in its industry. (Tr. 236.) Across the country, local snack manufacturers consider Frito-Lay and private-label brands to be very large, fierce competitors with the ability to price local concerns out of business. (Tr. 236.)

[9] For the 11-year period spanning from 2006 through 2016, Mike-sell's suffered an overall operating loss of approximately $5 million. (Tr. 243-44.) The greatest contributor to this overall operating loss was the Company's route sales division, which had losses exceeding $9 million during the same 11-year period. (ALJ, p. 6; Tr. 237, 244.)

[10] In 2011, Mike-sell's employed about 80 drivers. (RX-2, p. 5.) In 2012, the Company was forced to close three distribution centers and sell dozens of routes to distributors, reducing its workforce to around 35 drivers. (Tr. 690-91.) The number of drivers has further declined over the past five years, partially due to the sale of routes and partially due to route consolidations/mergers. (Tr. 247-48.) Mike-sell's currently employs 14 drivers who collectively serve 12 routes. (ALJ, p. 6; Tr. 246-48.) The rest of the Company's over 170 routes are serviced by distributors. (Tr. 247.)

[11] Distributors schedule their own sales appointments, and expand their own territories, either by client or by geography, without prior approval from Mike-sell's. (Tr. 599-600, 967.) For example, TMT, on its own initiative expanded its territory into northern Ohio and Michigan. (Tr. 600-02.)

[12] The Union never denied that its Stewards received advance notice of these routes sales; the Union simply insisted that notice given to its Stewards—as opposed to its Business Agents—was ineffective. (RX-43, pp. 11-12.) The Paolucci Award rejected this argument, as "[t]o find otherwise would mean that the Company would have to second guess every communication it had with the Union Steward." (RX-2, p. 19.)

- In late 2009, Mike-sell's sold two routes to Ohio Citrus. Both displaced drivers could bump into other routes, but one chose to resign. The Union was notified of the decision, but neither requested to bargain nor filed a grievance or unfair labor practice charge. (RX-2, p. 7.)

- In late 2010, Ohio Citrus returned the two routes it purchased in 2009. Mike-sell's brought one route back in-house and reassigned it to a driver, but the other route was re-sold to Snyder's of Berlin. The Union was notified of these decisions, but neither requested to bargain nor filed a grievance or unfair labor practice charge. (RX-2, p. 7.)

- In mid-2011, Snyder's of Berlin returned the route it bought in 2010. Mike-sell's no longer wanted it, so it was mainly abandoned, except for a small part that was merged into an existing route. The Union was notified of this decision, but neither requested to bargain nor filed a grievance or unfair labor practice charge. (RX-2, pp. 7-8.)

- In late 2011, Mike-sell's sold the newly-merged route, plus one more, to Buckeye Distributing. Displaced drivers bumped into other routes. The Union was told of the decisions, but neither requested to bargain nor filed a grievance or unfair labor practice charge. (RX-2, p. 8.)

The Company's inherent right to change its business model by selling routes was confirmed in 2012, through an arbitration award issued by Arbitrator Michael Paolucci ("Paolucci Award").[13] (ALJ, pp. 6-7; Tr. 151-52, 163-64, 259-60, 263-64, 273-74, 874-75; RX-2.) This was the first time the Company's decision to sell routes had been challenged, and the Union cited Article I (Recognition), Article II (Union Security), and Article VIII (Seniority) of the Expired Contract to support its grievance. (RX-2, p. 3-4.) The Union demanded, as a remedy, that Mike-sell's bargain over the decision and its effects. (RX-2, p. 2.) After a full evidentiary hearing, Arbitrator Paolucci denied the grievance based on Section 5 of Article VIII-B (Route Bidding) of the Expired Contract,[14] as well as the Company's inherent entrepreneurial right to determine the nature, scope, and direction of its enterprise, and the manner in which it conducts business. (RX-2, p. 16-20.)

The Paolucci Award emphasized that Mike-sell's transfers both the risk and potential reward by selling routes to distributors, which distinguishes the situation from typical subcontracting.[15] (RX-2, pp. 16-17.) Because an entire sales territory—or business unit—is sold to a third party, Mike-sell's "reduce[s] its involvement to that of a supplier." (RX-2 p. 17.) Unlike a subcontracting arrangement, the sale of routes

[13] The Paolucci Award was issued during the term of the Expired Contract, which is the document the Union and the Regional Director believe should still govern drivers' employment today. (RX-2, pp. 13-14.) However, the route elimination provisions in Article VIII-B of the Expired Contract are substantively indistinct from those in Article 11 of the Revised Final Offer. (JX-1, pp. 16-17; RX-3, p. 9.)

[14] Article VIII-B - Section 5 of the Expired Contract provides (in part): "In the event that it becomes necessary to eliminate a route or combine one route with another, employees affected shall have the right to displace a less senior employee." (JX-1, pp. 16-17.)

[15] Arbitrator Paolucci's Award seems to inadvertently confuse the number of routes owned/serviced by distributors with the number of distributors who own/service the routes. (RX-2, p. 5.) It is common for several routes to be owned/serviced by one distributor. (Tr. 390; RX-16.) Thus, as of June 27, 2012 (i.e., the date of the arbitration), Mike-sell's had about 70 routes run by drivers and over 100 routes run by distributors. (Tr. 246-47.)

necessarily involves a calculation of multiple factors beyond mere cost savings, such as return on investment and net impact on profitability of the enterprise. (RX-2 pp. 17-18.) It essentially involves "a whole new method of doing business," whereby Mike-sell's "loses all control" of the distribution. (RX-2 pp. 18-19.)

The Paolucci Award further confirmed that Article VIII-B of the Expired Contract—which recognizes the Company's right to "eliminate a route"—applies equally where routes are entirely abandoned and where routes are sold to distributors. (RX-2 p. 20.) And while not requiring route eliminations to be financially justified, the Paolucci Award nevertheless recognized the untenable situation that could result if the grievance were sustained: Mike-sell's could be "forced to keep non-performing assets (in the form of a route)" and "forced to continue a business activity that loses money every day."[16] (RX-2, p. 18.)

After the Paolucci Award issued, the Company route sales division continued to flounder.[17] (Tr. 305; RX-15.) Mike-sell's thus relied on the Paolucci Award (as well as controlling law) to eliminate over three dozen more routes after the term of the Expired Contract ended.[18] (ALJ, pp. 8-9; Tr. 151-52, 263-64, 305-08, 336-37, 340, 358, 362, 757.) Several of these routes were later returned to Mike-sell's and thereafter re-sold to new distributors.[19] (ALJ, pp. 8-9; Tr. 326-27, 330-31, 348-50, 358, 700-02.) Mike-sell's notified the Union of each elimination decision and its effective date, and the Company further offered to bargain over any effects. (ALJ, pp. 8-9; Tr. 318, 337-38, 345, 752-53, 757-59; RX-8.) The Union neither requested to bargain over the decision to sell the routes nor filed a grievance or unfair labor practice charge to challenge the route eliminations.[20] (ALJ, pp. 8-9; Tr. 308, 318, 321, 340, 346, 357, 360.)

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[16] The ALJ seems to suggest that Mike-sell's eliminated the Marion, Ohio, route only "because . . . it continued to lose approximately $1,100 per week." (ALJ, p. 6.) Such a narrow view of the Company's objectives is inaccurate. While the Marion, Ohio, route happened to be unprofitable, so were all Company sales routes! (Tr. 237, 243-44.) Thus, individual route profitability has never been the impetus for the Company's desire to change its outdated business model. (Tr. 244, 305-06, 319-20, 372.) As repeatedly explained during the hearing, Mike-sell's is instead focused on shifting the risk of loss, liquidating assets, and reallocating capital toward manufacturing. (Tr. 244-45, 320, 331, 340, 557, 898.)

[17] It is undisputed that Mike-sell's provided the Union with copies of requested Profit-and-Loss Statements for the Company's entire route sales division for recent years, all of which reflect large-scale losses. (Tr. 475-76; RX-15.)

[18] On November 18, 2012, Mike-sell's sold 16 Cincinnati routes, 10 Columbus routes, and 3 Sabina routes to Buckeye Distributing. (Tr. 303-04.) About six months later, Mike-sell's sold 5 Greenville routes to Gaudio Distributing effective June 1, 2013. (Tr. 316-17, 751; RX-6; RX-32.) The Company then sold 4 Springfield routes to Helm Distributing on August 18, 2013. (Tr. 336-37, 757; RX-33.)

[19] For example, Helm Distributing returned the 4 Springfield routes and Gaudio Distributing returned the 5 Greenville routes after servicing them for a couple years, and Mike-sell's thereafter re-sold all 9 Greenville/Springfield routes to The Big TMT Enterprize LLC in December 2015. (Tr. 348-50, 354-55, 586-87, 616-17, 619, 630-31, 637, 762; RX-1; RX-16.)

[20] The parties did bargain over the effects of these route eliminations, specifically coming to an agreement with the Union regarding special bumping rights and/or severance. (ALJ, pp. 8-9; Tr. 306-07, 342.)

C. Events Precipitating the Instant Complaint

In April 2016, Mike-sell's announced it would explore the possibility of selling more routes to distributors.[21] (ALJ, p. 10; Tr. 73-74, 147-48, 363-65; JX-2.) Mike-sell's was considering opportunities for operational and strategic business changes that would allow the Company to "focus more on manufacturing and branding." (Tr. 151-52, 244, 364, 374, 898.) By letter to the Union dated April 27, 2016, Mike-sell's promised to "provide . . . timely notice of its decision" and "honor its obligation to bargain over the effects of the route elimination(s)."[22] (ALJ, p. 10; JX-2.) The Union filed a grievance to challenge the Company's intent to sell additional routes, citing several provisions of the Expired Contract that would allegedly be violated if any route sales came to fruition. (ALJ, p. 10; Tr. 74-75, 148-49, 167, 366, 780, JX-4.) However, the Union made no demand to bargain over the issue.[23] (Tr. 173-74.) Mike-sell's processed the Union's grievance under the Revised Final Offer, but there was no labor contract under which to arbitrate.[24] (ALJ, pp. 10; Tr. 80, 152.)

On July 11, 2016, Mike-sell's notified the Union of its decision to sell Route 102, covering the area around greater Xenia, Ohio.[25] (ALJ, p. 11; Tr. 80-82, 153, 376; JX-5.) The Union raised no objection to this decision, nor did the Union demand to bargain or file a grievance to challenge it. (Tr. 82, 376-77.)

On August 29, 2016, Mike-sell's told the Union of its decision to sell Routes 104 and 122, covering areas of Bellbrook and Beavercreek, Ohio. (ALJ, p. 11; Tr. 82-83, 154-55; JX-6.) The Union filed a grievance over the sale of both routes.[26] (ALJ, p. 11;[27] Tr. 83-84, 155; JX-7.) The Union also sent Mike-

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[21] Mike-sell's sent two separate letters—one to the Union, and one to all employees—stating that the Company was "considering" selling additional routes to distributors. (JX-2 (emphasis added); JX-3 (emphasis added).) Contrary to the ALJ's finding, neither of these letters definitively confirmed a "plan" to sell off Company routes. (ALJ, p. 10.)

[22] The letter referenced the Paolucci Award as "recognizing" the Company's inherent right to sell its routes, but the letter neither stated nor implied that the Paolucci Award or the Expired Contract provided the basis for that right.

[23] Contrary to the ALJ's finding that the "Union did not demand to bargain . . . because no routes had been selected at that time" (ALJ, p. 10), there was no evidence presented as to why the Union made no demand to bargain.

[24] The ALJ correctly recognized that Mike-sell's "denied violating any provisions of the parties' expired agreement." (ALJ, p. 10.) But this general denial was not made in a vacuum; it was made in the context of responding to a grievance that specifically referenced the Expired Contract. (Tr. 111; JX-4.) The Company's denial should therefore not be interpreted as some sort of implied admission of reliance on the Expired Contract to justify the sale of routes. The denial was simply based on the fact that the Revised Final Offer—not the Expired Contract—was in place. (Tr. 110-11, 267.)

[25] Despite the ALJ's finding, nothing in the July 11th letter states the Company has made a "final decision" about anything. (ALJ, p. 20; JX-5.)

[26] Once again, Mike-sell's accepted and processed the grievance under the Revised Final Offer, but there was no labor contract under which to arbitrate. (ALJ, p. 11; Tr. 152-53, 161, 172.)

[27] The ALJ's Decision mistakenly cites the date of September 29th instead of August 29th. (ALJ, p. 11; JX-7.)

sell's a letter demanding to bargain over the decision to eliminate Routes 104 and 122, as well as seeking documents purportedly necessary for decisional bargaining. (ALJ, pp. 11-12; Tr. 156-157, 89; JX-8.)

On September 12, 2016, Mike-sell's replied to the Union's demand, declining to engage in decisional bargaining over elimination of the routes and further declining to produce information requested for the specific purpose of such decisional bargaining.[28] (ALJ, p. 12; Tr. 86-88, 157; JX-9.) The Company explained its position and cited specific passages from the Paolucci Award.[29] (Tr. 157-58; JX-9.) Mike-sell's also reiterated its willingness to bargain over the effects of any route eliminations,[30] as well as its willingness to produce information relevant or necessary for the Union to perform its statutory duty to bargain over mandatory subjects. (ALJ, p. 12; JX-9.)

Also on September 12, 2016, Mike-sell's notified the Union of its decision to sell Route 131, covering territory in Middletown and Springboro, Ohio. (ALJ, p. 13; Tr. 90, 159-60, 406; JX-10.) The Union filed a grievance over the sale of Route 131,[31] as well as Charge No. 09-CA-184215 challenging the elimination of all four routes since July 2016.[32] (ALJ, pp. 2, 13; Tr. 90, 117, 159-60, 409; JX-11; RX-38.)

The elimination of Routes 102, 104, 122, and 131 collectively resulted in the one-time liquidation of Company assets valued at $126,000,[33] as well as annual savings of nearly $195,000 for non-labor expenses.[34]

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[28] Just a few days earlier, Mike-sell's had already given the Union requested copies of Profit-and-Loss Statements for the Company's route sales division for multiple years. (Tr. 476-78, 480-81, 882-85; RX-15; RX-40.) Moreover, just a few days later, Mike-sell's provided the Union with complete copies of its audited financial statements for the years 2012 through 2015. (Tr. 482-83; RX-42.)

[29] Contrary to the ALJ's repeated findings, Mike-sell's never told the Union "it was permitted [to sell routes] under the management-rights clause (Article XIX)" of the Expired Contract or otherwise "relie[d] upon" that language. (ALJ, pp. 6, 21-22.) Because Mike-sell's has always had the inherent right to change its business model by selling routes—independent of any labor contract—the Company justified its position simply by citing the Paolucci Award's recognition of this principle. (JX-3; JX-5; JX-6.) In any event, it is undisputed that drivers have not worked under the terms of the Expired Contract for more than three years, as Mike-sell's implemented its Revised Final Offer in June 2013. (ALJ, pp. 8-9 at fn.11; RX-3.) Thus, to the extent Mike-sell's is found to have impliedly relied on any management rights clause, it would have to be the language in the Revised Final Offer—not the Expired Contract that became inapplicable three years earlier.

[30] The Union never requested to engage in effects bargaining. (Tr. 249.) In any event, the sales of the four routes coincided with drivers' resignations or retirements, so there were no layoffs—just a rebid of routes. (Tr. 113, 182, 248-49, 377, 408.)

[31] Once again, Mike-sell's accepted and processed the grievance under the Revised Final Offer, but there was no labor contract under which to conduct an arbitration. (ALJ, p. 13; Tr. 80, 152.)

[32] On December 9, 2016, the Union amended its unfair labor practice charge, limiting the 8(a)(5) allegation of failure to provide information to the Union's requests related to decisional bargaining over the sale or routes rather than the Union's requests related to "contract negotiations." (*Compare* GC-1(a) *with* GC-1(c).)

[33] This total capital recoupment came from the liquidation of four sales territories ($74,000), four trucks ($34,000), and warehouse- and truck-stored inventory ($18,000). (ALJ, p. 13; Tr. 541-52.) Although the sale of the territories and trucks were financed and thus resulted in a steady income stream over time, the Company's lenders immediately recognized the full value of the sales as "receivables" on its balance sheet, which enabled Mike-sell's to obtain a credit line increase after the four sales were consummated. (Tr. 544-47.)

(ALJ, p. 13; Tr. 538-541-42.) The four route eliminations also resulted in approximately $229,000 in annual labor cost savings,[35] but these savings would be offset by the higher cost of distributor margins totaling $324,000 for the same time period.[36] (ALJ, p. 13; Tr. 540.) In the end, when the annual labor and non-labor cost savings were collectively measured against the cost of distributor margins, Mike-sell's expected to realize over $89,000 in savings per year. (Tr. 540, 548.)

For a regional family business like Mike-sell's, with total net assets of only $5.8 million,[37] the one-time capital recoupment combined with the annual savings meant that well over $200,000 would be returned to Company coffers within 12 months. (Tr. 539-40.) Projecting the 2016 route eliminations to increase its net worth by almost 3.5% in the first year alone, Mike-sell's had newfound confidence to reallocate resources and make major manufacturing improvements.[38] (Tr. 549-50.) The four route eliminations also reduced the time managers spent running routes to cover for unplanned driver absences, a distraction consuming about 55 workdays per year before the route sales but only about 14 workdays per year after the route sales.[39] (Tr. 542-43.) Since recapturing an estimated 41 management workdays—two full work months—per year, Mike-sell's has greatly increased the time dedicated to calling on high-volume clients, selling incremental displays, managing customer relations concerns, updating point-of-sale merchandising and resetting retailer shelves, promoting new products, and generating new accounts.[40] (Tr. 542-43.)

Mike-sell's also reaped several intangible benefits from its sale of routes in 2016. For example, the Company reduced its risk of loss due to fraudulent transactions and uncollectible customers, as well as lost,

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[34] The annual non-labor cost savings of almost $195,000 resulted from elimination of one management position ($108,000), one part-time warehouse position ($14,000), maintenance and fuel for four trucks ($57,000), more than 20% of all stale product costs ($6,000), and commercial insurance on four trucks ($4,500), as well as a new-found revenue source in the form of rental payments for handheld scanners ($4,500). (ALJ, p. 13; Tr. 539-40.)

[35] The annual labor cost savings came from eliminating commissions ($152,000), pension contributions ($35,000), healthcare ($7,000), life insurance ($1000-$2000), federal/state taxes ($13,000), workers' compensation premiums ($6,000), and paid time off benefits ($14,000). (ALJ, p. 13; Tr. 539.)

[36] Mike-sell's used the actual sales for the four routes in question to determine the would-be distributor margins for the same time period. (Tr. 540.)

[37] Net shareholder equity as of March 31, 2017, was $5.8 million. (ALJ, p. 6; Tr. 284.)

[38] In March 2017, for example, Mike-sell's invested over $260,000 to build and install a new overhead conveyor system in its manufacturing plant. (Tr. 549-55; RX-27; RX-28.) The Company's old system was still functioning as designed, but as compared to modern technology, it operated very slowly, produced excess waste and noise pollution, and often required expensive maintenance and hard-to-find parts. (Tr. 550.) Since its installation in February 2017, the new overheard conveyor has increased overall efficiency and reduced down time, waste, and maintenance costs. (Tr. 549-50.) Mike-sell's would not have been able to replace its overhead conveyor if not for the sale of the four routes in 2016. (Tr. 553.)

[39] These before-and-after estimates are based on an average of full-year absenteeism statistics for 2014 and 2015 versus partial-year absenteeism statistics (annualized) for 2016 and 2017. (Tr. 542-43, 831-32.)

[40] The ALJ's Decision completely ignores the major capital improvements made possible by the sale of routes in 2016, despite the fact that these manufacturing improvements reflect an investment of 5% of the Company's total net worth. (Tr. 284, 549-55; RX-27; RX-28.)

stolen, and damaged property from within its trucks, warehouses, and distribution centers. (Tr. 543, 834-35.) In addition, distributors are generally a more motivated sales force than Company drivers because distributors have no weekly minimum salary or paid time off benefits upon which to rely. (Tr. 543-44.) If distributors take time off work without finding coverage, or do not sell all the product they order, or do not price the product at a profitable level, then they can sustain business losses that keep them from bringing home any income at all. (Tr. 605, 669-70, 972.) This has happened on at least a few occasions since the routes were sold in 2016.[41] (Tr. 669-70, 972.)

Despite submission of well-reasoned position statements summarizing the Company's response to the Union's Charge, the Board's Regional Director for Region 9 ("Regional Director") issued the Complaint on March 17, 2017, seeking (in part) "an order requiring . . . [Mike-sell's] rescind the sales of its Ohio Routes #102, #104, #122 and #131 and assign those routes to Unit employees," and setting a hearing date of May 31, 2017. (GC-1, ¶ 11.) Meanwhile, the Regional Director filed a Petition and Memorandum in Support for 10(j) Injunction ("Petition"). *See* Petition filed in *NLRB v. Mike-sell's Potato Chip Co.*, No. 3:17-CV-126, ECF 1 and ECF 1-1 (S.D. Ohio April 12, 2017). The Petition was promptly denied, with the U.S. District Court remarking that "[t]his is not a case . . . where the employer flouted its obligations under the Act," as "the Company's position "has substantial support in the caselaw . . . ." *NLRB v. Mike-sell's Potato Chip Company*, ECF 18, 2017 WL 2311295, at *9 (S.D. Ohio May 26, 2017).

D. The Rights and Responsibilities of Independent Distributors

Routes 102 and 131 were sold to The Big TMT Enterprize LLC ("TMT"), a business owned by Independent Distributor Charles T. Morris ("Morris"). (ALJ, pp. 11, 13; Tr. 350-52, 378-79, 406-07; RX-1; RX-10; RX-12.) TMT paid Mike-sell's $29,600 for its two routes, as well as $8,000 for a truck. (Tr. 506, 509-10; RX-17, 18, 20.) Routes 104 and 122 were sold to BLM Distributing LLC ("BLM"), a business owned by Independent Distributor Lisa Krupp ("Krupp").[42] (ALJ, p. 11; Tr. 382-83; JX-12; RX-11.) BLM

[41] The ALJ completely ignored the significant recoupment of managerial resources—two full working months per year—that resulted from the 2016 route sales. And although the ALJ makes a single, hasty reference to "risk of loss" (ALJ, p. 6), he gives the concept short shrift as it relates to reducing the threat of fraudulent transactions, uncollectible customers, and lost, stolen, damaged, and expired property for the Company.

[42] For about nine years, Krupp worked as a Union driver employed by Mike-sell's, but she decided to take the opportunity to start her own business when the Company announced its intention to sell additional routes in 2016. (Tr. 945.)

paid Mike-sell's $39,000 for its two routes, as well as $10,000 for a truck.[43] (Tr. 507; RX-17, 19.) By becoming distributors for Mike-sell's, both BLM and Big TMT had purchased the "exclusive right to distribute Mike-sell's products within a given territory."[44] (Tr. 485.)

Prior to selling any routes, Mike-sell's meets with prospective buyers to see which routes they are interested in purchasing and to discuss their business plan. (Tr. 173, 512.) Mike-sell's met with Krupp at least two or three times and with Morris at least three or four times regarding the sale of the routes. (Tr. 513, 955.) The Company wanted to ensure that they had the requisite industry knowledge, work experience, and skill set to succeed, as they would receive no training from Mike-sell's. (Tr. 605, 794, 797-99, 973.) In addition to these meetings, Krupp and Morris were required to complete an Independent Distributor Application ("ID Application"), disclosing (among other things) their financial condition and assets, their banking relationships and account balances, their real estate, any outstanding loans or unpaid taxes, and their contingent liabilities. (Tr. 513-14; RX-21; RX-22; RX-23; RX-24.) Mike-sell's also typically requires prospective buyers to submit to a credit check and an asset inventory, as well as to submit evidence of their corporate status and their articles of incorporation or formation.[45] (Tr. 513-14; RX-21, pp. R00596-R00600; RX-22, pp. R00618-R00635.) Because Mike-sell's wants to partner with distributors in a way that both businesses succeed, the Company declines to work with prospective buyers who lack industry knowledge or fail to provide sufficient financial information. (Tr. 522, 524; RX-23; RX-24).[46]

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[43] Notably, although both BLM and TMT opted to buy a truck from Mike-sell's, neither had to do so, as Mike-sell's sets no requirements for its distributors' vehicles or businesses. (Tr. 487, 492, 569, 593-94, 596-602, 960-61, 963, 966, 968, 971-73.) In fact, BLM considered buying trucks from other vendors, and TMT did buy several trucks from other vendors. (Tr. 593, 959.) In addition, although not required to do so, both BLM and TMT utilized financing available through Mike-sell's for the purchase of their routes and trucks. (Tr. 492, 506, 960; RX-18; RX-19; RX-20.) Each loan had a 3% interest rate, and both BLM and TMT executed promissory notes specifying a payment schedule and subjecting them to fines and penalties, and ultimately default, if they were late in making their payments to Mike-sell's. (Tr. 492, 560, 960; RX-18, 19, 20).

[44] The ALJ notes that the Agreement provides only a "primary" right to distribute, rather than an "exclusive" right. (ALJ, p. 5 at fn.7.) The testimony confirmed that the right is "primary" because—unlike Company drivers—distributors have the independent judgment and discretion to choose whether or not to service any given customers within their defined territory. (Tr. 613-15, 1054.) When distributors decide not to service certain accounts, these customers may be serviced by other means. (Tr. 613-15, 1054.) Distributors do, however, have the "exclusive" right to distribute as to all accounts within their territory that they choose to service.

[45] Though Krupp formed BLM in order to purchase Company routes, Mike-sell's did not assist in establishing her business. (Tr. 986.)

[46] The hiring process for drivers is quite different than the purchasing process for distributors. (Tr. 529.) The Company's Employment Application is much less extensive and devoid of sensitive questions about finances and liabilities, and driver applicants are not subject to credit checks or asset inventories. (Tr. 134, 203, 534; RX-25.) But driver applicants are subject to drug screens, physical exams, and criminal background checks, whereas prospective distributors are not. (Tr. 529, 532, 533-34, 982; RX-31.) The interview process is also different, with driver candidates interviewed by human resources and distributor candidates interviewed by sales managers. (Tr. 512, 529-30.) Finally, driver applicants are subject to a driving record check to weed out applicants with spotty or unsafe driving records, and drivers are also required to disclose any driving citations/restrictions they receive after their hire. (Tr. 532; RX-29.) Distributors are never subject to a driving record/license check, and they need not report any driving citations/restrictions at any time. (Tr. 533, 983.) The ALJ erred by failing to recognize these critical distinctions.

Just to start out as a distributor, both BLM and TMT made significant investments far beyond their territory and trucks,[47] including but not limited to (1) procuring storage space;[48] (2) assuming the immediate expense of existing Company inventory from trucks and warehouses;[49] (3) renting handheld scanners;[50] (4) purchasing general commercial liability insurance; (5) retaining their own attorneys and accountants; (6) paying for insurance, repairs, and maintenance on trucks; (7) establishing their own corporate entity; and (8) paying their own taxes and those of their employees. (Tr. 590-94, 605, 962, 965, 973; JX-12; RX-16.) Finally, BLM and TMT each entered into an Independent Distributor Agreement ("Agreement") with Mike-sell's.[51] (Tr. 389; JX-12; RX-16.) Parts of the Agreements, including the margins paid to distributors, were negotiable. (Tr. 704.) In fact, between different distributors, margins vary by as much as 7%. (Tr. 706.)

III. QUESTIONS PRESENTED

Mike-sell's submits the following questions for review, based on the Company's Exceptions: (A) Whether the ALJ erred in finding that Mike-sell's violated Sections 8(a)(1) and 8(a)(5) of the Act by refusing to bargain over its decision to sell sales territory to independent distributors; (B) Whether the ALJ erred in finding that Mike-sell's violated Sections 8(a)(1) and 8(a)(5) of the Act by refusing to provide information sought by the Union for such decisional bargaining; and (C) If any liability is found, whether the ALJ erred in proposing an overbroad remedy, order, and notice to employees.

IV. ARGUMENT

For an unlawful refusal to bargain or unilateral change under Section 8(a)(5), the ALJ must find that "there is an employment practice concerning a mandatory bargaining subject, and that the employer has

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[47] Notably, TMT has invested a total of $250,000 in five delivery trucks, most of which were financed through GMC or Allied Bank. (Tr. 590-93.)

[48] TMT rents a 4,400-square-foot storage unit at a cost of $2,400 a month. (Tr. 590-91, 594.) BLM rents a storage unit at a cost of $390 per month. (Tr. 962). Mike-sell's neither instructed nor advised TMT and BLM about their chosen storage solutions. (Tr. 963.) In fact, BLM has exercised its right to change its storage solution without seeking permission from Mike-sell's. (Tr. 966).

[49] Mike-sell's recouped $18,000 from the warehouse- and truck-stored inventory that was sold along with the four routes. (Tr. 541.)

[50] Distributors are not required to rent hand-held scanners from Mike-sell's, and in fact, some distributors have chosen to buy their own. (Tr. 628.) Both BLM and TMT chose to rent hand-held scanners from the Company in order to avoid the hassle of purchasing their own scanners and syncing them to the Company's system. (Tr. 594, 628, 963.)

[51] TMT originally only purchased one route from Mike-sell's and entered into an Agreement at that time. (RX-1.) When TMT later purchased more Company routes, only the Agreement's Exhibit was updated because all other contractual terms remained the same. (Tr. 587; RX-16.)

made a significant change thereto without bargaining."[52] *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005) (emphasis added). For an unlawful failure to provide information under Section 8(a)(5), the ALJ must find that Mike-sell's failed "to provide requested information that is potentially relevant and will be of use to a union in fulfilling its responsibilities as the employees' exclusive bargaining representative, including its grievance-processing duties."[53] *UPS, Inc.*, 362 NLRB No. 22 (Feb. 26, 2015). The General Counsel did not satisfy the burden of proof for either allegation, so the ALJ's Decision should be reversed, and the Complaint should be dismissed in its entirety.

A. The Record Does Not Contain Substantial Evidence that Mike-sell's Violated Sections 8(a)(1) and 8(a)(5) of the Act by Refusing to Bargain over the Sale of Routes to Independent Distributors. (Relates to Exceptions 1-2, 4-22, 26-77, 82-96)

The elimination of individual routes—like the closure of discrete business units—is not a mandatory subject of bargaining, so Mike-sell's was not required to bargain with the Union over its decision to sell the four routes at issue. The ALJ failed to recognize that, regardless of any collective bargaining relationship or the existence of any labor contract, employers retain certain inherent rights to manage their businesses, unless and until such rights are expressly bargained away. For example, absent anti-union animus, an employer retains the inherent right to transfer and assign work;[54] maintain discipline and promote efficiency;[55] control production;[56] change operational procedures;[57] invest or withdrawal capital;[58] and sell or

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[52] As explained later herein, if the ALJ makes this initial finding, Mike-sell's may defend its unilateral action by showing that the Union "clearly and unmistakably waived its right to bargain over the change." *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005).

[53] The Complaint also alleges a violation of Section 8(a)(1) of the Act, which requires a showing that Mike-sell's engaged in conduct reasonably tending to "interfere with, restrain or coerce" employees in the free exercise of Section 7 rights. *See Dover Energy, Inc.*, 361 NLRB No. 48 (2014), *enf. denied on other grounds in Dover Energy, Inc. v. NLRB*, 818 F.3d 725, 729-30 (D.C. Cir. 2016); *American Freightways Co., Inc.*, 124 NLRB 146 (1959). This 8(a)(1) interference claim is derived from (and dependent upon) the 8(a)(5) claims because—apart from the sale of routes and the failure to provide information—neither the ALJ's Decision nor the General Counsel's Complaint recognizes a separate 8(a)(1) claim. (GC-1, ¶ 10.)

[54] *NLRB v. Acme Indus. Prod., Inc.*, 439 F.2d 40, 41-43 (6th Cir. 1971) (absent anti-union animus, employer not required to bargain over decision to move production unit to another plant); *Macy's Missouri-Kansas Div. v. NLRB*, 389 F.2d 835, 840-41 (8th Cir. 1968) (recognizing "historical rights of an employer to transfer employees as efficiency demands" and "the inherent right of an employer to assign work to his employees," particularly in absence of anti-union animus).

[55] *Id.*

[56] *USW v. NLRB*, 243 F.2d 593, 596 (D.C. Cir. 1956), *rev'd in part on other grounds*, 357 U.S. 357 (1958) (finding that employer has "certain . . . inherent rights, such as the rights to production, to orderly conduct, and to cleanliness and order on his property").

[57] *NLRB v. Dixie Ohio Exp. Co.*, 409 F.2d 10, 10-11 (6th Cir. 1969) (absent anti-union animus, employer need not bargain over decision to "streamline the procedure of loading and unloading merchandise," despite resulting layoffs); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108, 111, 113 (8th Cir. 1965) (absent anti-union animus, decision to distribute through independent operators instead of employee-salesmen was not mandatory bargaining subject because it involved "basic operational change" and "partial liquidation and a recoup of capital investment").

[58] *Adams Dairy, Inc.*, 350 F.2d at 111.

merge business units.[59] The U.S. Supreme Court has confirmed that unilateral decisions about what lines of business to pursue—and what methods to use in pursuing them—are likewise among the inherent rights of any employer. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 677 (1981).

Contrary to the ALJ's Decision, this case is not governed by *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964) or *Dubuque Packing Co.*, 303 NLRB 386 (1991) and its progeny. (ALJ, pp. 14-18.) The Company's sale of routes to distributors did not equate to subcontracting, such as in *Fibreboard*. 379 U.S. at 213-14. Nor did Mike-sell's relocate its distribution center and replace its drivers with other workers who fulfilled the same operational functions, such as in *Dubuque*.[60] 303 NLRB 386, 391. This case is instead far more analogous to *First National Maintenance*, *W. Virginia Baking Co.*, 299 NLRB 306 (1990), and *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), as the situation extends beyond merely "substituting one set of employees for another." It is undisputed that Mike-sell's did not sell its routes based on anti-union animus,[61] and in the absence of such unlawful motivation, the Company's inherent right to determine the nature and scope of its enterprise deserves great deference.

1. The ALJ failed to recognize that this case is governed by First National Maintenance and its progeny.

In *First National Maintenance*, the issue was whether "an economically-motivated decision to shut down part of the business" was a mandatory subject of bargaining. *Id.* at 680. Two months after winning a certification election, the union gave notice of its desire to negotiate an initial contract. *Id.* at 669. The employer neither responded nor sought to consult with the union. *Id.* Then, two weeks later, the employer unilaterally cancelled a major services contract with a long-time customer, ignoring the union's demand to bargain over the decision. *Id.* The U.S. Supreme Court acknowledged that cancellation of the contract "had

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[59] *NLRB v. Transmarine Nav. Corp.*, 380 F.2d 933, 938-39 (9th Cir. 1967) (absent anti-union animus, employer's termination of business and reinvestment of capital in different enterprise in another location was "[a] decision of such fundamental importance to the basic direction of the corporate enterprise" that it "is not included within the area of mandatory collective bargaining").

[60] The Board has held that "a decision to relocate unit work . . . is more closely analogous to the subcontracting decision found mandatory in *Fibreboard* than the partial closing decision found nonmandatory in *First National Maintenance*." *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991). The Board further confirmed that "[t]he standard . . . announce[d] [in *Dubuque*] addresses only decisions to relocate unit work" and "express[es] no view as to what standard will be used in analyzing the other management decisions referred to in . . . *First National Maintenance*." *Id.* at fn.8 (emphasis added).

[61] The ALJ fails to acknowledge the undisputed fact that the Union voluntarily withdrew its 8(a)(3) allegation as confirmed via letter from the Regional Director dated March 13, 2017. (*Compare* GC-1(a) (including 8(a)(3) allegation) *and* GC-1(c) (including 8(a)(3) allegation) *with* GC-2 (excluding 8(a)(3) allegation).)

a direct impact" on the bargaining unit "since jobs were inexorably eliminated." *Id.* at 677. However, the decision "had as its focus only the economic profitability of the contract [with the customer], a concern . . . wholly apart from the employment relationship," so it "involv[ed] a change in the scope and direction of the enterprise . . . akin to the decision whether to be in business at all." *Id.* The High Court aptly explained:

> A union's interest in participating in the decision to close a particular facility or part of an employer's operations springs from its legitimate concern over job security. . . . The union's practical purpose in participating, however, will be largely uniform: it will seek to delay or halt the closing. . . . It is unlikely . . . that requiring bargaining over the decision itself, as well as its effects, will augment this flow of information and suggestions. . . .There is an important difference, also, between permitted bargaining and mandated bargaining. Labeling this type of decision mandatory could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose.

Id. at 681, 683. Despite absence of a labor agreement or contractual management rights clause, the employer's decision to cancel the services contract with its customer was still not a mandatory subject of bargaining. The U.S. Supreme Court balanced the parties' competing concerns and found that the employer's inherent managerial interest outweighed any potential impact on unit employees because "management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business." *Id.* at 674.

Just as in *First National Maintenance*, the Company's sale of routes marked a fundamental change in its business model—a critical shift in the scope and direction of the enterprise—as to the four discrete territories eliminated.[62] (Tr. 306, 318, 320, 331, 340, 354, 364.) As the Paolucci Award recognized, by selling its routes to distributors, the Company "transfer[s] the expense and the potential revenue to a third party," thereby "removing the risk and reward from its purview." (Tr. 163-64, 259-60; RX-2, p. 17 (emphasis in original).) Hence, "[i]n losing control of the business [unit], and the business decisions, the Company has reduced its involvement to that of a supplier." (Tr. 163-64, 259-60; RX-2, p. 17.) Forcing Mike-sell's to bargain over the decision to discontinue routes, liquidate related assets, and reallocate its capital would cripple the Company's "freedom to manage its affairs." *First National Maintenance*, 452 U.S. at 677.

[62] Each individual route is tracked separately for sales volume, payroll, and customer account purposes, so the elimination of each route is analogous to the liquidation of a separate business unit. (RX-14; RX-34.) The Company's overall goal is to increase profitability by freeing-up resources consumed by its route sales division and reallocating them to manufacturing and branding. (Tr.173, 244-45, 318, 340, 374, 549, 898.)

Both the Board (including Region 9) and the Circuit Courts have already found this precise decision—converting from drivers to distributors—to be a non-mandatory subject of bargaining. *See, e.g.*, *W. Virginia Baking*, 299 NLRB 306 at 307-16, 325 (finding decision to convert from driver-salesmen to distributors was not mandatory subject and citing NLRB Region 9 Dismissal Letter in Case 09-CA-023141, stating "employer's decision to discontinue its own distribution system and rely on independent distributors involved a fundamental change in the nature and direction of the employer's operations"); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965) (same); *see also Agencia De Publicaciones De Puerto Rico, Inc.*, 353 NLRB No. 68 at fn.9 (Dec. 24, 2008) (in light of *First Nat'l Maint.*, complaint failed to state claim by alleging "decision to sell . . . distribution rights [wa]s a mandatory subject of bargaining"); *Johnson's Indus. Caterers, Inc.*, 197 NLRB 352, 355 (1972) (assuming without deciding that "an employer is not required to bargain about a decision to change from an employee distribution system to a system of distribution by independent contractors").

In the strikingly-similar case of *Adams Dairy*, for example, the Eighth Circuit confirmed that an employer's decision to liquidate part of its business is not a mandatory subject of bargaining. There, a dairy decided to change its direct sales distribution system by selling product directly to distributors, who in turn would re-sell it to retail and wholesale outlets. *Id.* at 111; *see also Adams Dairy Co.*, 137 NLRB 815, 819 (1962), *enf. denied* (citing details of employer's business). The dairy's routes and trucks were sold to distributors as part of the conversion, and the only expectation was that distributors maintain sanitary facilities, high-quality product standards, and customer goodwill. *Id.* The sales territory purchased by distributors—though similar—did not perfectly mirror the routes and accounts formerly serviced by driver-salesmen. *Id.* In addition, the distributors took title to the product as soon as they received it, so the dairy had no legal concern for the product thereafter, as the distributors were responsible for re-selling it to recoup their investment. *Id.*

The Eighth Circuit distinguished the U.S. Supreme Court's opinion in *Fibreboard Paper*, where the decision to subcontract maintenance work "did not alter the [c]ompany's basic operation." 350 F.2d at 110

(citing 379 U.S. 203 (1964)). The Eighth Circuit agreed that, under *Fibreboard* circumstances,[63] "to require the employer to bargain . . . would not significantly abridge his freedom to manage the business." *Id.* at 111. But unlike the outsourcing in *Fibreboard*, the employer in *Adams Dairy* was not the primary beneficiary of the distribution work, as the dairy had no direct interest in whether distributors (as opposed to driver-salesmen) operated at a profit or loss. *Id.* Moreover, in *Adams Dairy*, the employer had already gradually sold ten routes, on a piecemeal basis, before its in-house distribution system was totally dismantled. *Id.* at 114. The Eighth Circuit thus found that the union "must have recognized" an entire system of distributors was possible—especially (but not exclusively) where the labor contract confirmed that "[n]othing . . . shall prevent Employer from enlarging, decreasing or altering the specified territory of any route nor . . . from putting on, splitting, rearranging, consolidating or eliminating any route . . . ." *Id.* at 114-15. The Eighth Circuit held that "the fact provision was made for the termination of a route should have, and probably did, put the union on notice" of the risk that all routes could be sold to distributors. *Id.* at 115.

Like the Eighth Circuit in *Adams Dairy*, the Board has also confirmed that "distributorship conversions . . . are nonmandatory subjects of bargaining because they involve a fundamental change in the nature and direction of the business." *W. Virginia Baking*, 299 NLRB 306, 313. In *W. Virginia Baking*, the Board adopted the decision of the Administrative Law Judge,[64] which held that a company's decision to convert driver-salesmen to independent distributors was not a mandatory subject of bargaining because:

- Most factors affecting distribution profit and loss were transferred to distributors. *Id.* at 314-15.
- Distributors set prices on product for most customers, except large chain accounts. *Id.* at 314.
- Distributors "made the final decision on ordering product, though [the company] still ha[d] input, and some control, especially with promotions arranged with large chain customers." *Id.* at 314. (Emphasis added).
- Distributors set their own work schedule and route. *Id.* at 314.
- Distributors could extend credit. *Id.* at 311, 314.

[63] In *Fibreboard,* neither the employer nor the independent contractor made any capital investments or operational changes as part of the conversion. The employer merely replaced existing employees with an independent contractor's workers, who performed the very same work under similar conditions, but at a lower rate and with no fringe benefits. *Fibreboard Paper*, 379 U.S. 203 (1964).

[64] The Board in *W. Virginia Baking* had no reason to review the judge's finding as to whether the conversion was a mandatory subject of bargaining because the parties had, in fact, bargained to impasse. *W. Virginia Baking Co.*, 299 NLRB 306, fn.3 (1990).

- Distributors could sell non-competitive product. *Id.* at 314.
- Distributors had to control stales and bore half the risk of loss for stales. *Id.* at 315-16.
- Distributors bore complete responsibility for their trucks. *Id.* at 310, 316.
- Distributors exercised substantial control over their operating expenses. *Id.*
- Distributors exercised substantial control over—and were free to negotiate—operating expenses, like fuel, insurance, truck repairs, warehouse space, accounting services, etc. *Id.* at 310, 315.
- Distributors purchased the right to distribute the company brands in a defined area. *Id.* at 316.
- Distributors were free to hire employees to assist in their business, and they were responsible for finding someone to service their territory in the event they could not service it. *Id.* at 311, 315.
- The company had exercised control over driver-salesmen employees with regard to personal appearance, truck cleanliness, route order, product ordering, and day-to-day job performance. But with few exceptions, the company could only make recommendations to distributors, who were free to accept or reject them. *Id.* at 315.
- Title to the product passed to distributors at dockside, and the company legally had no concern or control over what they did with the product. *Id.* at 315.
- Distributors could choose how they disposed of their product. *Id.* at 316.
- The company suggested financing the trucks through Wachovia Bank, and the company financed the sales territories itself. The sale and financing of the trucks and territories appeared to be arm's-length transactions with interest involved, and the distributors were free to find different financing, if they chose to do so. *Id.* at 316.
- The company was motivated to change its business model in order to recoup capital resources and reallocate them from distribution to production. *Id.* at 308-09, 313-14, 316.

Together, *Adams Dairy* and *W. Virginia Baking* set forth the industry-specific framework for the *First National Maintenance* analysis necessary to this case.[65]

2. *The Company's relationship with its distributors falls squarely within W. Virginia Baking and Adams Dairy, despite that Mike-sell's did not sell off all its routes.*

Although the Agreements set forth the initial terms between distributors and Mike-sell's, the testimony plainly established that these relationships develop and evolve over time, sometimes in ways

[65] The ALJ dismisses *W. Virginia Baking* based on the Board's finding that it need not review the judge's decision related to mandatory subjects of bargaining because the issue was mooted by actual bargaining that took place, and the ALJ further dismisses *Adams Dairy* by asserting he is "bound by Board law and cannot rely upon the reasoning of the Court of Appeals." (ALJ, pp. 18-19.) But *W. Virginia Baking* is the only agency decision directly on-point, and the judge's undisturbed holding is fully consistent with the Eighth Circuit's prior decision in *Adams Dairy*. Thus, in the absence of more analogous Board precedent, both *Adams Dairy* and *W. Virginia Baking* provide at least persuasive authority to guide the *First National Maintenance* analysis in this case.

contrary to the contract language.[66] (ALJ, pp. 5-6; Tr. 569, 597-98, 987, 569, 980; RX-1; RX-16.) The Company's relationship with distributors is materially different from its relationship with drivers. Many differences were discussed at the hearing, the most pertinent of which are summarized in the following table:

Differences in Relationship[67]	Route Sales Drivers	Independent Distributors
Guaranteed salary / Assumes risk of loss	Yes (Tr. 132-34, 213-18, 720-21, 949, 951)[68]	No (Tr. 556-57, 596, 669, 970-71)[69]
Buys product outright*	No (Tr. 202-03, 556, 596, 602)	Yes (Tr. 602, 970-71)
Required to work certain days / hours*	Yes (Tr. 135, 563-64, 953)	No (Tr. 563-64, 606, 974)
Must return to Mike-sell's by set time*	Yes (Tr. 135, 953)	No (Tr. 563-64, 606, 974)
May distribute competing products	No (Tr. 954)	Yes (Tr. 597-98, 987)
Own their trucks and pay related costs*	No (Tr. 132-33, 202-03, 949)	Yes (Tr. 487, 488, 508, 509, 962, 965.)
Mike-sell's covers for days off	Yes (Tr. 190, 565, 952)	No (Tr. 565, 607, 976)
May hire own employees / contractors*	No (Tr. 202-03, 565, 952)	Yes (Tr. 566, 606, 965)[70]
Chooses and pays for warehouse space*	No (Tr. 202-03)	Yes (Tr. 597, 962; JX-12; RX-16)[71]
Subject to drug testing	Yes (Tr. 202-03, 529, 532, 982; RX-31)	No (Tr. 537, 983)
Limited to 55 hours / week	Yes (Tr. 258)	No (Tr. 563-64, 606, 974)
Subject to workplace rules / discipline	Yes (Tr. 559, 567; RX-29)	No (Tr. 559, 593, 968)
Decide type / amount of product to sell	No (Tr. 562, 947)	Yes (Tr. 563, 602, 970)
Must use Company displays*	Yes (Tr. 949)	No (Tr. 604, 972; JX-12, § 10.)
Subject to appearance standards	Yes (Tr. 950)	No (Tr. 596-97, 983-84)[72]
May carry non-employees in truck	No (Tr. 978)	Yes (Tr. 979)
Can refuse to service customers*	No (Tr. 969)	Yes (Tr. 598-99, 625-26, 967-68)[73]
Subject to physical examination	Yes (Tr. 538, 982-83)	No (Tr. 538, 983)
Subject to driving record / license check	Yes (Tr. 202-03, 532-33, 558-60, 982)	No (Tr. 533, 561, 983)
Subject to criminal background check	Yes (Tr. 529, 981-83)	No (Tr. 529)
Required to be corporate entity	No (Tr. 533)	Yes (Tr. 533)
Completes employment application	Yes (Tr. 529, 531, RX-25)	No (Tr. 529)
Subject to credit check / asset inventory	No (Tr. 203, 533-34)	Yes (Tr. 513-15; RX-21; RX-22; RX-23)
Can re-sell routes to other distributors	No (Tr. 202, 952)	Yes (Tr. 569, 980)
Can change promotions / prices / billing	No (Tr. 569-70, 949)	Yes (Tr. 570, 603-10, 972, 990-91)[74]
Must keep specific paperwork*	Yes (Tr. 71, 103, 947-48, 950)	No (Tr. 606)
Extend credit to customers	No (Tr. 948-49)	Yes (Tr. 610)

[66] The ALJ fails to recognize that the actual terms of the business relationship between the Company and its distributors differ in several respects from the language of the Agreement. (ALJ, p. 5-6 and fn.7.) For example, distributors can and do expand their own territories, either by client or by geography, without prior approval from Mike-sell's. (Tr. 599-602, 613-15, 967.)

[67] The ALJ acknowledges fewer than half of these material differences; those acknowledged are notated with an asterisk. (ALJ, pp. 5-6, 18.)

[68] Drivers testified inconsistently about "stales," first claiming their wages were "reduced" for stales but later admitting Mike-sell's essentially gave them an "advance" on all product delivered, assuming it would sell. (Tr. 133-34, 213-14, 216.) The "stale reduction" was just a return of the advance already received, thus bringing their final pay in line with actual sales, as corroborated by Krupp, a former driver. (Tr. 134, 213-14, 216, 948-49.)

[69] Indeed, there are weeks when distributors do not make any money at all (and instead sustain business losses) because they order too much or too little product, and/or do not price the product at a profitable level. (Tr. 604-05, 669-70, 972.) On other occasions, after taking ownership of the product, distributors have at times donated cases of product to a local soup kitchen. (Tr. 971.)

[70] TMT contracts with 12 independent operators, and Krupp has one full-time employee. (Tr. 606, 965.)

[71] BLM has exercised its right to change its storage solution without seeking permission from Mike-sell's. (Tr. 966).

[72] During her time as a Company driver, Krupp was subject to specific appearance standards that no longer applied to her as a distributor. (Tr. 950.)

[73] Distributors can, and have, refused to service certain customers without consequence. (Tr. 598-99, 625-26, 967-68.)

[74] Mike-sell's neither advertises for distributors nor requires them to follow Company promotions. (Tr. 603, 972.) Other than chain accounts, distributors have discretion to change pricing on all products. (Tr. 570; JX-12, § 3; RX-16, § 3.) Even with chains, there is only a max price—distributors could charge less if they wanted. (Tr. 570.) Both TMT and BLM have raised and lowered prices from those set by Mike-sell's. (Tr. 608, 990-91.) Also, distributors can, and have, changed the manner in which customers are billed and/or extended credit to customers. (Tr. 609-10.)

In fact, Mike-sell's distributors exercise even more independent discretion, judgment, and control over their businesses than did the distributors in *W. Virginia Baking* and *Adams Dairy*, as shown by the following distinctions:[75]

- Mike-sell's distributors have complete discretion to raise or lower product prices for most clients, and they also retain discretion to lower product prices for large chain customers. (Tr. 570, 608, 990-91; JX-12, § 3; RX-16, § 3.) *Compare W. Virginia Baking*, 299 NLRB at 314 (noting the company retained the right to set all product prices for large chain accounts).

- Mike-sell's distributors have complete discretion as to the type and amount of product they purchase, without input from Mike-sell's. *Compare Id.* at 314 (noting distributors "made the final decision on ordering product, though [the company] still ha[d] input, and some control, especially with promotions arranged with large chain customers").

- Mike-sell's distributors can, and do, sell competitive product in the same territories where they sell Mike-sell's product. For example, TMT sells products for Snyder-Lance, Grippo, and Hussman in the same stores where TMT sells Mike-sell's product. (Tr. 598.) *Compare Id.* at 314 (noting that distributors could sell only non-competitive product).

- Mike-sell's distributors bear the full risk of loss on all stale product. *Compare Id.* at 315-16 (noting that distributors only bore half the risk of loss for stales).

- Mike-sell's distributors have no performance standards whatsoever beyond storing product in a sanitary location. (Tr. 559, 596-97, 593, 968, 983-84; RX-16.) *Compare Adams Dairy*, 350 F.2d at 111 (noting that distributors must maintain "high product standards" and "good will").

The vast majority of the above-referenced factors were completely ignored by the ALJ's Decision, and they amply demonstrate that Mike-sell's distributors are truly independent entrepreneurs, differing in all material respects from Company drivers. The ALJ's hasty conclusion that the Company simply replaced drivers with distributors to do the "same work" reflects an overly-simplistic and inaccurate view of the relationships between the parties. (ALJ, pp. 17-18.)

The ALJ finds *W. Virginia Baking* and *Adams Dairy* "inapposite" mainly because they involved a total conversion of all routes to distributorships, whereas Mike-sell's retained 12 driver-run routes. That is, because Mike-sell's did not eliminate all in-house routes, the ALJ erroneously concluded "there was no actual change in [the Company]'s operations." (ALJ, pp. 18-19.) But nothing in *W. Virginia Baking* or *Adams Dairy* suggests that an employer cannot effect a fundamental operational change unless it converts completely to a new model. Indeed, the employer in *W. Virginia Baking* did "not . . . remov[e] itself totally

[75] The ALJ's Decision acknowledges none of these additional indicia of independent entrepreneurship.

from the business of distribution . . . [but] it did remove itself from this function to a very significant degree." 299 NLRB at 313. Furthermore, legitimate operational changes have been recognized even when a conversion is less than complete. *See, e.g., NLRB v. Dixie Ohio Exp. Co.,* 409 F.2d 10, 11 (6th Cir. 1969) (decision to change operating procedure was not mandatory subject of bargaining, despite affecting only 15 of 44 employees); *see also Dixie Ohio Express Co.,* 167 NLRB 573, 581 (1967) (recognizing that "[t]he changes made were not extensive;" that "[b]oth before and after August 17, the terminal handled inbound and outbound freight, the only difference after August 17 being that it is not now handled simulatenously;" that "the classification of dockman has not been abolished;" that "there was no real change such as to constitute a difference in mode of operation in the handling of inbound and outbound freight at the terminal;" and that "the present mode of operation is the same as before [and the only] difference is that the methods used to conduct the work at the dock has been changed to accomplish a more efficient operation").

In the instant case, Mike-sell's sold four of 18 routes, eliminating almost 25% of its remaining sales territory. This brought the Company's total driver-to-distributor route ratio to 14-172, with 81.3% of all sales territory sold to distributors. While Mike-sell's cannot convert all its routes to distributorships due to financial reasons, that does not stop the Company from effecting meaningful change in the scope and direction of its enterprise so as to remove the sale of routes from the ambit of mandatory bargaining. Indeed, the ALJ's argument that Mike-sell's was somehow required to sell every driver-run route in order to change its business model amounts to little more than the legal equivalent of "go big or go home." Such an argument lacks support in Board law and is similarly unprecedented in most business contexts.

By way of analogy, if a truck dealership wanted to change business models to sell luxury sedans, and thus changed its product ratio to 80% sedans and 20% trucks, the dealership would no longer be a "truck" dealership. It would instead be a luxury sedan dealership that maintained a limited truck inventory. The presence of a few trucks would not change the fact that the dealership underwent a significant change in the scope and direction of its business. Like the dealership's sedan sales division and truck sales division, in this case, the Company's sales routes are discrete lines of business, capable of being sold piecemeal. Mike-sell's opted to change the nature of its enterprise by selling off routes as discrete business units, converting to a

distributorship model to the extent possible. With the 2016 route sales, Mike-sell's has steadily converted over 80% of its sales territory to the distributorship model, and the ALJ erred by failing to recognize the relative magnitude of this change.

In short, there simply can be no question that, under controlling precedent from the U.S. Supreme Court, and at least persuasive precedent from the Board and Circuit Courts, Mike-sell's changed its basic operations for four individual routes historically run by drivers, essentially selling off separate business units that handled distribution for those areas. (Tr. 306, 318, 320, 331, 340, 354, 364.) The ALJ's Decision fails to recognize that this strategic shift in the scope and direction of the Company's distribution model resulted in the partial liquidation of capital, new revenue streams, annual cost savings, reallocation of assets and resources, and increased lines of credit. (Tr.539-46, 548-49.) The arrangement basically reversed the order in which Mike-sell's realizes revenue by selling product up-front and retaining no legal interest in it, thereby transferring the entire risk of loss to the distributor. (Tr. 245, 557.) The Company's recouped capital and newfound revenue was, in turn, reinvested in core manufacturing and branding initiatives, two activities at the heart of the business. (Tr. 173, 244-45, 318, 340, 374, 549-53, 898; RX-27; RX-28.) To require bargaining over the decision to close individual business units and/or redistribute assets and capital would greatly abridge the Company's freedom to manage its enterprise. *Adams Dairy*, 350 F. 2d at 111. Accordingly, the ALJ erred in finding the sale of routes to be a mandatory subject of bargaining.

3. The ALJ failed to recognize that Mike-sell's made no "material, substantial, and significant change" to drivers' terms and conditions of employment.

Assuming *arguendo* that the sale of routes was a mandatory bargaining subject (which it is not), the ALJ must also find that the unilateral sale of routes in 2016 was "a material, substantial, and significant change" to drivers' terms and conditions of employment. *See, e.g., The Bohemian Club*, 351 NLRB 1065, 1066 (2007). The Sixth Circuit has confirmed that, "if an employer has frequently engaged in a pattern of unilateral change . . . during the term of the CBA, then such a pattern of unilateral change becomes a 'term and condition of employment,' and that a similar unilateral change after the termination of CBA is permissible to maintain the *status quo*." *Beverly Health & Rehab. Servs., Inc. v. NLRB*, 297 F.3d 468, 481

(6th Cir. 2002). Thus, "it is the actual past practice of unilateral activity . . . and not the existence of the management-rights clause . . . that allows the employer's past practice of unilateral change to survive the termination of the contract." *Id.*

Mike-sell's did not unilaterally change any drivers' working conditions. After all, the Company sold and re-sold over four dozen driver-run routes during the seven-year period preceding the route eliminations at issue.[76] (Tr. 303-04, 317, 330-31, 336-38, 350; RX-1; RX-2, pp. 7-8; RX-5; RX-6; RX-7; RX-8; RX-9.) Three dozen routes were sold for the very first time after the end of the Expired Contract term. (Tr. 303-04; RX-1; RX-5; RX-6; RX-7; RX-9.) While the Union received advanced notice of these post-expiration sales, it neither demanded to bargain nor filed a grievance or unfair labor practice charge to challenge them. (Tr. 303, 305-06, 308, 321, 330, 332, 346, 357, 360.) As to the four sales in 2016 that the Union eventually challenged, no drivers were laid off as a result of those sales. (Tr. 113, 182, 248-49, 377, 408.) Because the routes were sold pursuant to a longstanding practice, the sales reflected a continuation of the *status quo* rather than a unilateral change in violation of the Act. *See, e.g., Bohemian Club*, 351 NLRB at 1066; *George R. Klein News Co.*, 306 NLRB 118, 136 (1992).

The ALJ relies heavily on a recent Board decision holding that "unilateral, postexpiration discretionary changes are unlawful, notwithstanding an expired management-rights clause or an ostensible past practice of discretionary change developed under that clause." (ALJ Decision, pp. 22, 24 (citing *E.I. Du Pont De Nemours*, 364 NLRB No. 113, slip op. at *3-4 (Aug. 26, 2016).) The administrative parlance in *E.I. Du Pont* conflicts not only with the aforementioned Sixth Circuit law, but also with prior Board decisions and other Circuit Court rulings. *See, e.g., Beverly Health & Rehab. Servs., Inc.*, 346 NLRB 1319 (2006); *Courier-Journal I,* 342 NLRB 1093 (2004) and *Courier-Journal II,* 342 NLRB 1148 (2004); *Capitol Ford,* 343 NLRB 1058 (2004); *Westinghouse Elec. Corp.,* 150 NLRB 1574 (1965); *Shell Oil Co.,* 149 NLRB 283 (1964); *see also E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012).

[76] The ALJ found that the Union received no notice of routes that the Company resold to other distributors after their initial purchaser went bankrupt. (ALJ, pp. 8-9.) However, the record evidence demonstrates that at least the Union Steward was aware of the reversions and resales. (Tr. 137, 175, 327-29, 355-57, 373.)

Moreover, the 2016 decision in *E.I. Du Pont* is highly distinguishable on its facts. For example, in *Du Pont*, the employer and the union were actively engaged in ongoing negotiations for successor agreements at two facilities, and it was undisputed that the parties had not reached a good faith impasse. *E.I. Du Pont*, 364 NLRB No. 113, slip op. at *2, 13-14, 17. Also, the *E.I. Du Pont* union promptly challenged every alleged unilateral change made after the labor agreements expired. *Id.* at *2. In addition, *E.I. Du Pont* addressed only the post-contract-expiration viability of "a practice of making the same discretionary unilateral changes . . . pursuant to a management rights clause." *Id.* at *16 (emphasis added).

Here, unlike the ongoing bargaining in *E.I. Du Pont*, the parties have not met for contract talks since June 2014,[77] despite the Company's production of requested information and repeated invitations to resume meetings. (Tr. 261-62, 475-83, 882-92; RX-15; RX-40; RX-42.) Nor did the Union promptly challenge the Company's unilateral actions, raising no objection to the sale of over three dozen routes after the end of the Expired Contract. (Tr. Tr. 303-04, 317, 330-31, 336-38, 350.) But perhaps most important—contrary to the ALJ's finding—it is undisputed that the Management Rights Article of the Expired Contract is not what empowered Mike-sell's to eliminate routes in the first place. In its Petition for 10(j) Injunction, the Regional Director repeatedly admitted that the Paolucci Award "did not determine . . . the Union had waived its right to protest such sales under the Managements Rights Clause;" that "the Route Bidding procedure does not speak to [the Company's] prerogative to sell the routes, but merely addresses one effect of such change;" and that "the arbitrator only concluded that the contract did not prohibit [Mike-sell's] from selling the routes as opposed to giving it the privilege to do so." *NLRB v. Mike-sell's Potato Chip Co.*, No. 3:17-CV-126, ECF 1-1, pp. 4, 10 (S.D. Ohio April 12, 2017). The Union likewise admitted, in its post-arbitration brief to Arbitrator Paolucci, that the Management Rights Article of the Expired Contract did not permit the sale of routes and that Mike-sell's "went outside the provisions of the [Expired Contract]" when it sold the route in 2011.[78] (RX-43, pp. 8-10 (emphasis added).) In sum, the ability to eliminate and sell routes has always been

[77] The ALJ found that "[t]he parties met for bargaining over a successor agreement from October 2012 through June 2014." (ALJ, p. 10.) Although this finding sets forth the correct month and year for the parties' first and last bargaining sessions, Mike-sell's excepts to the finding to the extent it implies that the parties met continuously during that entire span of time.

[78] The Union pointed out at hearing, and in its brief to the ALJ, that Mike-sell's relied on the Management Rights Article in its own post-arbitration brief in 2012. (CP-1.) But the bottom line is, the Union was right—and the Company was wrong—to the extent that Arbitrator Paolucci did not rely on or cite to the Management Rights Article in his Award. (RX-2, pp. 16-21.)

an inherent right of the Company that is recognized by—but not dependent upon or conferred by—the Route Bidding Article and the Paolucci Award. (RX-2, p. 20; RX-2.)

Rather than *E.I. Du Pont* then, this case is much more analogous to *Adams Dairy*, where "the union must have recognized that an entire system of independent [distributors] was a possible alternative," especially since "the . . . contract itself provided the procedures to be taken in the event route or routes were to be discontinued or eliminated." 350 F.2d at 114-15 (emphasis added). Like the *Adams Dairy* opinion, the Paolucci Award suggests the Union "must have recognized" the sale of more routes was possible, particularly given that the Route Bidding Article expressly confirms (and does not restrict) the Company's right to eliminate routes. (JX-1, pp. 16-17; RX-2, pp. 20-21; RX-3, p. 9.) The Route Bidding Article is separate from—and unrelated to—the Management Rights Article. (*Compare* JX-1, pp. 16-17 *and* RX-3, p. 9 *with* JX-1, p. 30 *and* RX-3, p. 18, respectively.) It is inappropriate to treat two distinct Articles the same when they address different topics and are intended for the benefit of opposite parties.[79] Discrete contract provisions containing context-dependent rights must be analyzed independently from (and less critically than) broad management rights clauses that purport to "give the employer the world." *See, e.g., Walt Disney World Co.,* 359 NLRB 648, 652-53 (2013) (analyzing limited reservation of rights as to staffing for catering functions separately from broad management rights clause granting authority to select number and identity of employees assigned to particular job classifications, and finding neither provision permitted elimination of job classifications); *Gratiot Cmty. Hosp.,* 312 NLRB 1075, 1084-85 (1993) (finding that more limited reservation of rights provision—permitting employer to determine number of shifts—allowed employer to unilaterally eliminate special shift program, despite finding that managements rights clause was too broad to confer such discretion). Thus, as in *Adams Dairy*, "the fact provision was made for the termination of a route [in the Route Bidding Article] should have, and probably did, put the union on notice" of the risk that Mike-sell's may choose to further reduce its Company route sales division by selling individual business units and reallocating its assets to manufacturing and branding. *See* 350 F.2d at 115.

[79] That is, the Route Bidding Article mainly benefits the Union, whereas the Management Rights Article mainly benefits the Company.

In short, the Company's unilateral decision to sell the four routes at issue was consistent with the parties' past practice, the Expired Contract, the Revised Final Offer, the Paolucci Award (which the Union never sought to vacate), and controlling law.[80] *Wp Co., LLC*, 358 NLRB 318, 323-24 (2012) (affirming ALJ Decision at JD-70-11, 2011 WL 5562019 (Nov. 15, 2011), that employer did not violate Act where it had "longstanding practice" of unilateral changes such that further unilateral action of same ilk was "continuation of the *status quo*"). Thus, Mike-sell's implemented no "material, substantial, and significant change" to mandatory bargaining subjects.

4. Even if Mike-sell's did materially change the status quo by eliminating the four routes at issue, the Union waived its right to bargain over those decisions.

A party may relinquish bargaining rights through a "clear and unmistakable" waiver. *See, e.g., Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Waiver may be established "by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two." *Am. Diamond Tool, Inc.*, 306 NLRB 570, 570-71 (1992) (internal citations omitted); *see also Gratiot Cmty. Hosp.*, 312 NLRB 1075, 1084-85. For example, a union waives its bargaining rights "if it receives advance notice of a proposed change and fails to request bargaining." *The Bohemian Club,* 351 NLRB at 1067. Waiver will also occur if no contract is in effect, the union has the chance to request bargaining over a mandatory subject but fails to do so, and further acknowledges the possibility for the same kind of unilateral action in the future by proposing contract language about it. *Diamond Tool,* 306 NLRB at 570-71.

[80] The Regional Director has long insisted the Expired Contract should still be in effect today, as evidenced by its compliance position in pending Board Case No. 09-CA-094143. Mike-sell's disagrees with the Regional Director and believes the Expired Contract was only required to remain in effect through June 12, 2013, after which the Company was privileged to lawfully implement its Revised Final Offer (including its Route Bidding and Management Rights Articles) based on the parties' good faith bargaining impasse. *See, e.g., George R. Klein News Co.*, 306 NLRB 118, 136 (1992) ("an employer's obligation to comply and give effect to . . . a collective-bargaining agreement continues after the agreement expires, until the employer has fulfilled, or been relieved of its duty to bargain about changing the existing terms . . . as, e.g., where the parties have bargained to impasse, and the changes thereafter made are consistent with any bargaining proposal previously advanced by the employer . . . or, where . . . the union had effectively waived its right to bargain on the subject matter subsequently changed"); *Wp Co., LLC,* 358 NLRB 318, 323-24 (2012) (where good faith impasse existed, employer was privileged to continue past practice of unilaterally assigning non-unit employees to perform unit work without bargaining, where unilateral work assignments were consistent with terms of parties' tentative agreement). As a practical matter, regardless of whether the Expired Contract or the Revised Final Offer is found to have been in place when the four routes were sold in 2016, the Paolucci Award and applicable law applies equally to both sets of terms because their Route Bidding Articles contain substantively indistinct route elimination provisions. (JX-1, pp. 16-17; RX-3, p. 9.) Nevertheless, it is absurd and hypocritical for the Regional Director to advocate for reimplementation of the Expired Contract as to Board Case No. 09-CA-094143, while completely ignoring the Route Bidding Article of that same Expired Contract for purposes of Board Case No. 09-CA-184215, particularly (though not exclusively) where the facts are so highly distinguishable from those in *E.I. Du Pont De Nemours*, 364 NLRB No. 113 (Aug. 26, 2016).

When Mike-sell's announced the potential sale of routes in April 2016, the Union filed a grievance claiming various violations of the Expired Contract. (ALJ, p. 10; JX-4.) However, the Union failed to actually demand bargaining, either in the grievance itself or during the grievance meeting in June 2016. (ALJ, p. 10; Tr. 172-74, 368-375.) Even after receiving written notice of the pending sale of Route 102 in July 2016, the Union still never asked to bargain over that decision or filed a grievance to challenge it. (ALJ, p. 11; Tr. 376-77, 780-81.) The ALJ held that the Union was not required to request bargaining because Mike-sell's presented its decision as a *fait accompli*. (ALJ, p. 20.) But the record facts show that Mike-sell's sought the Union's input more than four months before the Union requested any bargaining.

i. The Company's communications with the Union about the sale of routes did not amount to a *fait accompli*, particularly (although not exclusively) as to Routes 102, 104, and 122.

Before unilaterally implementing a change involving a mandatory bargaining subject, an employer is required to give timely notice to the union and a meaningful opportunity to bargain. *Mcgraw-Hill Broadcasting Co., Inc.*, 355 NLRB 1283, 1284 (Sept. 30, 2010). Upon receiving notice, the union must act with "due diligence" to request bargaining or be found to have waived its right to bargain. *Id.* A union is excused from requesting bargaining only if (1) the notice provides too little time for negotiation before implementation; or (2) the notice makes clear that the employer has no intent to bargain. *Id.* In such case, a bargaining demand would be futile because the employer's notice informs the union of nothing more than a *fait accompli*. *Id.* The General Counsel has the burden of proving a *fait accompli* through objective evidence. *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 fn. 12 (May 28, 1993). Neither a union's subjective impressions of an employer's state of mind, nor an employer's use of affirmative notice language is sufficient evidence to prove a *fait accompli*. *Id.*

The ALJ cited a few Board cases outlining the concept of a *fait accompli*, but all of those cases are readily distinguishable. (ALJ, pp. 19-20.) For example, in *UAW-DaimlerChrysler Natl. Training Ctr.*, 341 NLRB 431 (March 9, 2004), the Union had no reason to request bargaining because the employer literally announced its decision as a "done deal" and said nothing could be changed. *Id.* at 433. Similarly, in *Pontiac Ostepathic Hosp.*, 336 NLRB 1021 (Nov. 14, 2001), the employer gave the union notice only after the final

decision was already made, posted the change on its bulletin board (which "occurred only when decisions were final"), and stated in the posted notice that its changes "will be implemented." *Id.* at 1023-24. Likewise, in *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013 (1982), the employer presented a *fait accompli* by telling both the union and employees (at the same time) of a unilateral change to the attendance policy and then implementing the change immediately, despite the union's request for time to consider the new policy. *Id.* at 1017-18. Finally, in *Northwest Airport Inn*, 359 NLRB 690 (2013), the employer presented a *fait accompli* when, during negotiations for a successor contract, the employer announced it was laying off all unit members, and then did so when the contract expired eight days later, replacing them with subcontractors. In finding a *fait accompli*, the judge in *Northwest Airport Inn* relied on the fact that the employer testified at hearing that its decision to subcontract "had been made" and that any proposals from the union "made no difference." *Id.* at fn.2.

Unlike the clear futility seen in the Board cases cited by the ALJ, at no point did Mike-sell's present the sale of routes as a *fait accompli*. The Company's April 2016 notice informed the Union of the possibility of future route sales and specifically indicated that no final decision had yet been made. (JX-3.) Notices containing far more "final" language than this April 2016 letter have been found not to present a *fait accompli*. *See e.g. Vigor Indus., LLC*, 363 NLRB No. 70 (Dec. 16, 2015) (no *fait accompli* when notice to union stated, "we are heading towards non-smoking yards and would like to discuss recommended timing and process"). While the April 2016 notice anticipated a "final decision" several months later, this reference to an eventual "final decision" is not dispositive. "A union is entitled to bargain over a decision even after it has been made, but before it has been implemented. Similarly, an employer is not required to bargain before making its decision, but it is required to delay implementation to allow for good-faith collective bargaining once the decision has been made." *Mcgraw-Hill, Inc.*, 355 NLRB at 1285. Mike-sell's was thus entitled to tell the Union of its future plans, and the Union was entitled to request bargaining over them. That the Union chose not to request bargaining for over four months is simply no fault of the Company.

On July 11, 2016, Mike-sell's gave the Union notice that Route 102 would be sold two weeks later on July 24, 2016. (JX-5, p. R00438.) This was clearly enough notice for meaningful bargaining to take

place, if the Union so desired. *See, e.g., UAW-DaimlerChrysler*, 341 NLRB at 433 (noting that two weeks is sufficient notice to avoid a *fait accompli*). Despite receiving this notice via fax, mail, and email, the Union still sat back and did nothing. (JX-5, pp. R00437, R00440, R00442.) Route was sold as planned on July 24th, and the Union still filed no grievance and made no demand to bargain.

Over a month later, on August 29, 2016, Mike-sell's gave the Union notice that Routes 104 and 122 would be sold a week later, on September 4, 2016. (JX-6.) This notice was again sufficient to provide an opportunity for meaningful bargaining. *See, e.g., Hartmann Luggage Company,* 173 NLRB 1254 (December 12, 1968) (finding 4.5 days is sufficient notice to avoid a *fait accompli*). The Union filed a grievance that same day, alleging the pending sales violated various provisions of the Expired Contract but making no demand to bargain. (JX-7.)

Two days later, on August 31st, the Union sent Mike-sell's a letter containing an irrelevant information request and demanding to bargain over the sale of Routes 104 and 122. (JX-8.) Mike-sell's responded by letter on September 12th, noting that while the Company did not believe it was required to engage in decisional bargaining, it was willing to engage in effects bargaining. Finally, on September 12, 2016, Mike-sell's gave the Union notice that Route 131 would be sold at the end of the week, on September 17, 2016. This notice provided sufficient time for the Union to meet with the Company at the table—even if under the guise of effects bargaining. *Holiday Inn Central,* 181 NLRB 997 (April 8, 1970) (finding three days is sufficient notice to avoid a *fait accompli*). But the Union never demanded to bargain over the decision or the effects of the sale of Route 131.

Three months elapsed between the April 2016 initial notice of possible sales and before the July 2016 sale of Route 102. The Union did not ask to bargain over the anticipated route sales during this time. Nor did the Union seek to bargain over the sale of Route 102 at <u>any</u> time.[81] Thus, by the time of the August 29th notice of the sale of Routes 104 and 122, Mike-sell's had no reason to believe the Union wanted to bargain over the sales. The parties had never bargained over the sale of routes before, the Union had made no demand to bargain in connection with the April 2016 notice, <u>and</u> the Union took no action to grieve or

[81] Even in its August 31st demand to bargain over the sale of Routes 104 and 122, the Union <u>still</u> did not bother to include Route 102 as part of its bargaining request. (JX-8.) In fact, the Union made no absolutely no mention whatsoever of the sale of Route 102 until the filing of its charge.

demand bargaining over the sale of Route 102. Under these circumstances, it is abundantly clear that—at least as to the first three routes sold (i.e., Routes 102, 104, and 122)—the ALJ erred in finding that the Company's notices were presented a *fait accompli*. Indeed, the lack of a *fait accompli* is demonstrated by the fact that the Union eventually did demand to bargain over the sale of Routes 104 and 122.

In response to the Union's August 31st information request, Mike-sell's did indicate its belief that decisional bargaining was not required. However, the Company also indicated a willingness to meet with the Union about the sales. (JX-9.) Nothing in the record suggests that—had the Union simply taken the opportunity to meet with the Company and presented a compelling case during effects bargaining—that Mike-sell's would not have reconsidered its obligations as to decisional bargaining. But the Union never took Mike-sell's up on its offer to bargain over any perceived effects of the sales, which further demonstrates the absence of a *fait accompli* even as to the sale of the fourth route (i.e., Route 131).

ii. The Union's own conduct amply demonstrated its waiver of any purported right to bargain over the sale of any routes.

Alternatively, if the Company's notices constituted a *fait accompli* (which they did not), the Union engaged in a course of conduct that clearly and unmistakably waived any purported right to bargain over the decision to sell routes. First, the Union silently accepted the unilateral sale of over four dozen routes between 2009 and 2016—with more than three dozen sales occurring after the term of the Expired Contract. (Tr. 303-04, 317, 330-31, 336-38, 350; RX-1; RX-2, pp. 7-8; RX-5; RX-6; RX-7; RX-8; RX-9.) The Union's historical acquiescence in the sale of routes, and its consistent failure to request bargaining, is inexcusable. *See, e.g., Post-Tribune Co.,* 337 NLRB No. 192, 1280 (2002) (while a union's prior acquiescence does not operate as an automatic waiver of its right to bargain, where the past practice at issue has occurred with such regularity and frequency that it has become the *status quo*, a clear and unmistakable waiver will be found).

Second, despite its dismay with the Paolucci Award, the Union proposed keeping the same language in the Route Bidding Article that Arbitrator Paolucci had already found to recognize the Company's inherent

right to sell routes, a proposal on which the parties' ultimately reached tentative agreement.[82] (Tr. 274-75.) The deference accorded an arbitrator in interpreting labor contracts is firmly established as a matter of federal policy. That is, "interpretation of the collective bargaining agreement is a question for the arbitrator," as "[i]t is the arbitrator's construction which was bargained for." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960); *Olin Corp.*, 268 NLRB 573, 576 (1984) ("An arbitrator's interpretation of the contract is what the parties here have bargained for and, we might add, what national labor policy promotes"). Hence, the Union's proposal to maintain the very same contract language that it believed Arbitrator Paolucci interpreted in an unfavorable manner essentially served as acquiescence regarding how that language would be applied in the future.

Third, in November 2016, the Union proposed—for the first time—the following new language for the Management Rights Article: "Notwithstanding anything contained in this Agreement to the contrary, the Company shall not sell, transfer, or otherwise assign any current routes, in one transaction or a series of transactions, to any other person or entity without the agreement of the Union." (RX-4, p. R00490.) Prior to this proposal, the Union had always asked that the Management Rights Article remain unchanged.[83] (Tr. 287-88, 293-94.) This newly-proposed contract language only served to further confirm the Union's understanding that Mike-sell's did, in fact, have the right to "sell, transfer, or otherwise assign" routes to distributors, which (as the Paolucci Award recognized) could only be extinguished by "clear contract language." (RX-2, p. 20.) All of these facts make it abundantly clear that the Union knowingly gave a clear and unmistakable waiver of any purported right to bargain over the sale of routes.

5. Assuming Dubuque was applicable (instead of First National Maintenance and its progeny), the ALJ failed to apply (and the General Counsel failed to establish) all the elements of that decision.

[82] Mike-sell's initially sought to clarify the Route Bidding Article to incorporate the Paolucci Award, so it would be clear that the same bumping rights apply equally whether a route is abandoned versus sold. (Tr. 263-64; RX-3, p. 9.) Based on the Union's representation that no clarification was needed to confirm the applicability of bumping rights under either scenario, the parties eventually reached a tentative agreement to keep the same operative language in the Route Bidding Article. (Tr. 274-75; RX-4, p. R00487 at ¶ 3 (reflecting prior "TA").) This original language is not currently in effect for drivers because the parties did not agree to maintain the old Route Bidding Article until after the Revised Final Offer was unilaterally implemented in June 2013. Thus, the pertinent provision of the current Route Bidding Article states that, "[i]n the event that it becomes necessary to terminate or sell a route or combine one route with another, the displaced employee or employees who lose their routes due to this combination or elimination may use their seniority to bump any less senior employees within their currently assigned location." (RX-3, p. 9.)

[83] Again, it is undisputed that the Management Rights Article of the Expired Contract is not what empowered Mike-sell's to eliminate routes in the first place. The Regional Director's Petition repeatedly conceded this fact. *Mike-sell's*, No. 3:17-CV-126, ECF 1-1, pp. 4, 10. The Union's 2012 post-arbitration brief made similar admissions. (RX-43, pp. 8-10.)

The ALJ relies on the burden-shifting test in *Dubuque Packing Co.*, 303 NLRB 386 (1991), which was developed to analyze "whether a decision to relocate unit work is a mandatory subject of bargaining." *Id.* at 390. Under the *Dubuque Packing* test, the General Counsel must first prove "that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation." *Dubuque Packing*, 303 N.L.R.B. at 391. If the General Counsel successfully establishes a *prima facie* case, the burden shifts to the employer to show (1) "the work performed at the new location varies significantly from the work performed at the former plant;" (2) "the work performed at the former plant is to be discontinued entirely and not moved to the new location;" or (3) "the employer's decision involves a change in the scope or direction of the enterprise." *Id.* Alternatively, the employer may show that either (1) "labor costs . . . were not a factor in the decision," or (2) even if they were a factor, "the union could not have offered labor cost concessions that could have changed the employer's decision to relocate." *Id.*

The General Counsel did not establish a *prima facie* case under *Dubuque* here because Mike-sell's did not "relocate" any unit work that the Company continues to perform elsewhere. It is undisputed that Mike-sell's stopped performing distribution work for the four routes altogether. (Tr. 485.) It is also undisputed that Routes 102, 104, 122, and 131 were discrete, driver-serviced territories prior to 2016, having never been sold to distributors before. (Tr. 374-76, 381-82, 390-91, 406.) The sale of these routes thus undeniably affected "a basic change in the nature of the operation," as Mike-sell's no longer serviced the territories and no longer directly felt the risk of loss or the reward of success based on their sales volume. (Tr. 556-57, 596, 970-71; RX-2, pp. 16-17.) In sum, it is clear the General Counsel did not satisfy either threshold element under *Dubuque*, so the ALJ's reliance on that case is fundamentally flawed.

Assuming a *prima facie* case was made (which it was not), Mike-sell's established all *Dubuque* defenses—much less the single defense required. First, Mike-sell's detailed how the rights and responsibilities of distributors "var[y] significantly" from those of drivers. *See* Legal Argument - Section IV(A)(1-2), *supra.* Second, all distribution work Mike-sell's formerly performed on the routes was "discontinued entirely and not moved to [any] new location" of the Company. (Tr. 374-76, 381-82, 390-91, 406, 485.) Third, the sale of driver-run territory did indeed "involv[e] a change in the scope or direction of

the enterprise" for those discrete business units affected, as well as ongoing implementation of a new corporate business model that began years earlier.[84] (Tr. 244-47.) Fourth, Mike-sell's presented unequivocal evidence that "labor costs . . . were not a factor in the decision" to sell the four routes, as the Company simply wants to minimize its distribution business in order to maximize its manufacturing business. (Tr. 306, 318, 320, 331, 340, 355, 364.) Achievement of this goal obviously does not hinge on labor costs,[85] as Mike-sell's pays far more in distributor margins than in driver commissions, salary guarantees, and benefits for the same sales volume (Tr. 540), which was the dispositive factor in *W. Virginia Baking*. *See* 299 NLRB at 312. Fifth, Mike-sell's presented unrebutted evidence that the Union "could not have offered labor cost concessions that could have changed the [Company]'s decision to [sell the routes]." (Tr. 898-99, 902.)

The ALJ erroneously made the baseless and highly prejudicial assumption that labor costs "were a factor" and "played a role" in the Company's decision to sell routes. (ALJ, p. 18.) There is simply no evidence to support this finding; the record literally defies it. That is, the unrebutted testimony reflects that labor costs did not motivate the sale of any routes. (Tr. 306, 318, 320, 331, 340, 355, 364.) The ALJ also completely ignored unrebutted testimony that the Union had no ability to offer meaningful bargaining concessions in view of the Company's objectives to shift its risk of loss, liquidate its assets, and reallocate its capital to improved manufacturing methods. (Tr. 898-99, 902, 907-09.) Once this undisputed evidence is properly considered, it is clear the sale of routes is not a mandatory subject of bargaining, even under the *Dubuque* test. *See, e.g., Metro. Reg'l Council of Carpenters,* 358 NLRB 325, 325 fn.1 (2012) (affirming dismissal of complaint but refusing to accept ALJ's "speculative" findings in the absence of record evidence to support them); *Oaktree Capital Mgmt., LLC,* 353 NLRB 1242, 1243–44 (2009) (finding ALJ did not properly analyze and consider record evidence); *Atl. Mills Servicing Corp.,* 155 NLRB 853, 857 (1965)

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[84] The ALJ asserts that, because the Agreement confers on distributors "a primary, not exclusive, right to distribute . . . within a defined territory," this lack of exclusivity precludes treating the sale of routes like the transfer of discrete business units. (ALJ, p. 23.) But the testimony is clear that the right to distribute is "exclusive" as to all accounts within the territory that the distributor chooses to service. It is the entrepreneurial discretion that distributors have to refuse to service certain customers within their territory that requires those customers to be serviced by other means, such as by competing distributors. (Tr. 613-15, 1054.)

[85] The mere fact that labor costs comprised a fair share of the Company's route sales division operating expenses does not prove that Mike-sell's did not have a more important, strategic reasons for selling its routes. As the Fourth Circuit wisely explained in *Dorsey Trailers, Inc. v. NLRB*, "*Dubuque Packing* posits a false dichotomy between economic and labor costs." 233 F.3d 831, 844 (4th Cir. 2000). That is, economic reasons are not—and need not be—completely "distinct and apart from a desire to decrease labor costs." *Id.* (citing *Arrow Automotive Indus. v. NLRB*, 853 F.2d 223, 228 (4th Cir.1988)). Indeed, labor costs are "inescapably" a part of the economic calculus that any employer must consider in deciding whether to change its operation or business model. *Id.*

(rejecting ALJ inferences because they assumed facts not in the record); *Metal Arts Co.,* 148 NLRB 183, 183 (1964) (adopting "conclusions of the Trial Examiner which are based upon the credited testimony" but rejecting "opinions . . . which assume facts"); *Great Atl. & Pac. Tea Co.,* 110 NLRB 918, 924 (1954) (rejecting ALJ inferences where there was no record evidence to support them).

B. The Record Does Not Contain Substantial Evidence that Mike-sell's Violated Sections 8(a)(1) and 8(a)(5) of the Act by Refusing to Provide Information Sought by the Union for Purposes of Bargaining over the Decision to Sell its Routes. (Relates to Exceptions 3-4, 23-26, 78-85, 97)

Employers are only required to produce that information needed by the Union to fulfill its statutory obligations. *See, e.g., Southern Nevada Builders Assn.*, 274 NLRB 350, 351 (1985); *North Bay Center*, 287 NLRB 1223, fn.1 (1988). Unions cannot force employers to negotiate over non-mandatory subjects of bargaining, so they clearly have no statutory duty to bargain over such subjects—which in turn means they cannot justify information requests by asserting the data is needed to fulfill their statutory obligations. *See, e.g., Pieper Elec., Inc.*, 339 NLRB 1232 (2003) (no duty to furnish information sought in connection with non-mandatory subject); *In re California Pac. Med. Ctr.*, 337 NLRB 910, 914 (2002) (same); *Service Employees Local 535*, 287 NLRB 1223, fn. 1 (1988) (same).

In this case, Mike-sell's had the right to decline to respond to the Union's August 31st information request, which was made for the specific purpose of bargaining over the Company's decision to eliminate routes. (Tr. 156, 405, 474-75, 462, 782; JX-8.) As discussed above, the decision to sell individual routes reflects a fundamental change in the scope and direction of the Company's enterprise—akin to closing discrete, stand-alone business units—which is not a mandatory subject of bargaining.[86] *See, e.g., First Nat'l Maint.*, 452 U.S. at 684. Because the decision to sell routes is not a mandatory bargaining subject (and/or the Union waived its right to bargain), Mike-sell's need not produce information requested by the Union for the specific purpose of decisional bargaining.

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[86] Again, while Mike-sell's started out distributing its own products, the Company's core initiative has always been to manufacture and sell quality snack foods. (Tr. 173, 244-45, 318, 340, 374, 549-53, 898; RX-27; RX-28.) Mike-sell's is not in the delivery business, and it makes no sense for the Company to continue funding a losing endeavor. (RX-2, p. 18 (recognizing the absurdity of "a situation where [the Company] would be forced, by contract, to continue a business activity that loses money every day").) It is common industry practice for snack food manufacturers to sell their routes to distributors. *See Mrs. Baird's Bakery*, 117 LA at 1054 (recognizing that "[u]sing Independent Distributors has been a growing trend"). In fact, there are national route brokers whose sole purpose is to assist businesses in buying and selling geographic sales territories from manufacturers who no longer want to service them directly. *See, e.g.,* http://www.mrrouteinc.com (visited 7/7/2017); http://www.routesforsale.net (visited 7/7/2017); http://www.routebrokers.com (visited 7/7/2017).

Alternatively, if the sale of routes is a mandatory subject of bargaining (which it is not), Mike-sell's still need not produce the requested information because it is not relevant and necessary to the Union's statutory duties. As noted by the ALJ, information about subcontracts, even those relating to bargaining unit work and terms, is not presumptively relevant. (ALJ, p. 25 (citing *Disneyland*, 350 NLRB 1256 (Sept. 13, 2007) (employer did not violate Section 8(a)(5) and (1) by denying union's request to view certain subcontracts and files related to bidding and performance of subcontracts, nor did employer violate Section 8(a)(5) and (1) by refusing to provide union dates each subcontract was signed and performed, nature of work subcontracted, and names of subcontractors).) The Union may only satisfy its burden by demonstrating "a reasonable belief, supported by objective evidence, that the requested information is relevant." (ALJ, p. 25 (citing *Disneyland*, 350 NLRB at 1258 (emphasis added).) The Union "must do more than cite a provision of the collective-bargaining agreement." *Disneyland*, 350 NLRB at 1258. The Union must instead "demonstrate that the contract provision is related to the matter about which information is sought, and that the matter is within the union's responsibilities as the collective-bargaining representative," or that the relevance of the information should be apparent under the circumstances. *Id.* Contrary to the ALJ's finding, the Union satisfies neither test.

As to the Union's request for route profitability information,[87] Mike-sell's repeatedly told the Union that route profitability did not motivate its decision to sell the routes in question. Indeed, if individual route profitability had been the Company's focus, then (by the Union's own admission) the sale of routes would have been validated by the Paolucci Award.[88] But the Company's decision was not driven by individual

[87] The Union requested "all documents that demonstrate the profitability of all of the Company's routes for the period of September 1, 2014, through August 1, 2016, for profitability comparison purposes related to routes numbers 104, and 122." (JX-8, p. 2.)

[88] Mike-sell's would have no reason to withhold individual route profitability information, if it were relevant, as the information would only serve to prove that the routes were, in fact, unprofitable. (Tr. 411, 474.) Indeed, Mike-sell's presented unrebutted testimony that all four routes sold were, in fact, unprofitable. However, the Company did not disclose the routes' lack of profitability because it would mislead and confuse the Union as to the reason for their sale. (Tr. 414.) The ALJ erred in excluding as "irrelevant" and as a "summary document" the Company's proffered evidence of a profit-and-loss summary for the four routes at issue, despite the fact that this very summary was specifically requested by, created for, and produced to the Regional Director during the course of its investigation of the Union's charge. (Tr. 410-16.) The Regional Director's investigative request for this profitability summary constitutes an implied admission of its relevance to the charge allegations (even if not to the Union's statutory bargaining duties). *See NLRB v. Mike-sell's Potato Chip Company*, 2017 WL 2311295 (S.D. Ohio May 26, 2017) at ECF-17, p. 133-134, 143, 212-14 (admitting Board-requested summary as DX-3). Furthermore, the General Counsel failed to ever request the source documents underlying the summary that the Regional Director demanded, despite having copies of the summary and knowing that Mike-sell's had admitted the summary at the 10(j) hearing less than three weeks before the ALJ hearing. A party must actually request a summary's underlying documents, and provide a reasonable time and place for their production, before seeking to exclude a summary of voluminous records. *See R & R Assocs., Inc. v. Visual Scene, Inc.*, 726 F.2d 36, 37-38 (1st Cir. 1984) (summaries are properly admitted when party objecting to admission had ample opportunity to request to examine voluminous records underlying the summary, but failed to do so prior to hearing).

route profitability; it was driven by a desire to change business models. Thus, the relevancy of the Union's request for profitability information cannot be gleaned from the "context" of communications in which the Union was expressly informed that the sale of routes was unrelated to the information requested.

The remainder of the information request focused solely and exclusively on the relationship between Mike-Sell's and its distributors.[89] The Union provided no explanation of how the details of the Company's contracts and correspondence with distributors would assist the Union in bargaining over the decision to sell routes. Information about how distributors receive product and/or what correspondence has transpired provides no insight that would better equip the Union to persuade Mike-sell's to retain the routes in-house. So once again, the "context" does not clearly demonstrate the relevance of the Union's information request.

In short, the Union failed to provide any objective evidence of relevancy. Mike-sell's clearly told the Union that its decision to sell routes was not based on individual route profitability. It was then incumbent on the Union to either (1) revise its request to seek information related to the Company's stated reason for the route sales, or (2) provide objective evidence of relevancy to support the information request already made, despite its apparent lack of relation to the Company's explanation. The Union took neither action. Under clear Board precedent, like *Disneyland Park* cited by the ALJ, the Union cannot carry its burden to demonstrate relevance by doing nothing and resting on vague assertions of a right to information. Rather, because the information was neither presumptively relevant nor relevant by context—and because the Union failed to produce any evidence of relevance—Mike-sell's was under no obligation to provide any of the requested information.

C. Even if Mike-sell's Had Violated the Act, the ALJ Erred in Proposing an Overbroad Remedy, Order, and Notice to Employees. (Relates to Exceptions 26, 83-85)

Assuming some limited remedy were appropriate (which it is not), Mike-sell's contends the relief recommended by the ALJ is overbroad. First and foremost, it is patently improper to order Mike-sell's to rescind the sale of Route 102 and/or to bargain over it with the Union. It is undisputed that the Union has never requested to bargain over the sale of Route 102. (ALJ, p. 11; Tr. 376-77, 780-81.) Even once the

[89] The Union sought "a copy of the agreement between Mike-Sell's and the entity to whom Route No. 104 and Route No. 122 were scheduled to be sold;" "a description of how Mike-Sell's product was to be received by the entity to whom the two routes were to be sold;" and "a copy of all correspondence between Mike-Sell's and the entity to whom the two routes were scheduled to be sold."

Union finally requested bargaining over the sale of other routes, the Union still declined to include the sale of Route 102 in its bargaining request. (JX-8.) Given that the Union never requested bargaining over the sale of Route 102, it would be completely inappropriate to rescind and/or require bargaining over that sale.

In addition, to the extent Mike-sell's must rescind the sale of any routes and reassign them to drivers, that affirmative obligation must be clarified because the ALJ's proposed remedy does not reflect the *status quo* before the sales. It is undisputed that the sale of each route in 2016 coincided with a driver's resignation or retirement, so no layoffs were necessary when any of the four routes were sold. (Tr. 113, 182, 248-49, 377, 408.) Thus, regardless of whether the four routes were sold, Mike-sell's would have had four driver vacancies due to natural attrition, and the Company would have no legal obligation whatsoever to fill those positions. Mike-sell's thus does not have the manpower to cover the four routes should they be brought back in-house, and without clarification of the ALJ's remedy, the Company would be forced to hire new employees to service any routes it reacquired. Thus, to the extent any routes return to Mike-sell's, the remedy, order, and notice should be clarified to recognize the Company's established past practice of consolidating routes so that any reverting routes can be absorbed by incumbent bargaining unit drivers.

As to the Union's information requests, Mike-sell's should not be required to produce "all documents that demonstrate the profitability of all of the Company's routes for the period of September 1, 2014, through August 1, 2016, for profitability comparison purposes related to routes numbers 104 and 122." The requirement that "all documents" for "all routes" be produced could result in Mike-sell's spending countless hours locating and producing thousands of pages of largely unhelpful information, so long as those documents in some way reflect the profitability of one or more Company routes. The Union would likewise be frustrated by being forced to comb through thousands of pages of raw, unsynthesized data that cannot be easily digested—particularly by a party who is not familiar with its content. These mutual sources of frustration result from an information request that is grossly overbroad and unduly burdensome for both the Company and the Union. As such, Mike-sell's respectfully submits that any required production be limited to specific documents relevant to the issue and the bargaining needs of the Union.

Mike-sell's also contends that the ALJ erred in ordering the Company to "[m]ake affected employees whole, with interest, for any loss of earnings resulting from the subcontracting of unit work through the sale of Routes 102, 104, 122, and 131 to independent distributors, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses." (ALJ, p. 29.) This "backpay" award is inappropriate as there is no evidence that any bargaining unit member suffered any loss as a result of the sale of the four routes in 2016. No drivers were laid off when the routes were sold, and the Union never took Mike-sell's up on its offer to bargain over any other adverse effects, thereby impliedly admitting that none exist. To the extent drivers suffered any monetary losses as a result of the sale of routes in 2016—which the Company disputes—the Union had the opportunity to mitigate or eliminate those effects but chose not to do so. It is thus inappropriate to award backpay in this situation, as any lost wages resulted directly from the Union's own failure to bargain.

Finally, any order issued should address only those specific allegations actually raised in the Complaint: the sale of routes. A general bargaining order is improper and should not be issued. *In Re Arvinmeritor, Inc.,* 340 NLRB 1035, Fn. 2 (Nov. 24, 2003) (rejecting General Counsel's request for general bargaining order, as it was inappropriate in light of "Respondent's specific unilateral action"). Because the Company alleges only a specific, unilateral action brought about by the Company's reasonable belief that it had no duty to bargain over the sale of routes, a general bargaining order is both unnecessary and unjust.

V. CONCLUSION

For the reasons stated above, the Company's Exceptions should be granted, the ALJ's Decision should be reversed, and the General Counsel's Complaint should be dismissed because the record as a whole does not contain a preponderance of evidence that Mike-sell's violated Sections 8(a)(1) and 8(a)(5) of the Act by (1) refusing to bargain over its decision to sell sales territory to independent distributors; and (2) refusing to provide information sought by the Union for such decisional bargaining. Finally, even if some remedy were appropriate (which it is not), Mike-sell's contends that the relief recommended by the ALJ's Decision is overbroad and should be circumscribed to the extent necessary to effectuate the purposes of the

Act without requiring more than restoration of the *status quo*, and without rewarding employees for the Union's own inaction.

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2017, the foregoing was served via electronic filing through the National Labor Relations Board website (www.nlrb.gov) to the National Labor Relations Board's Office of the Executive Secretary, located at 1015 Half Street SE, Washington, DC 20570-0001, with additional service copies sent as follows:

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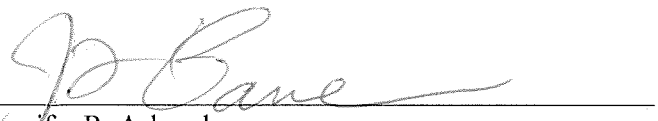

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